CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1933

LILLIAN F. SELLERS, ADMINISTRATRIX OF A. J. SELLERS, DECEASED, v. CAROLINA RAILROAD COMPANY, NORFOLK SOUTHERN RAILROAD COMPANY, AND G. R. LOYALL AND L. H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 20 September, 1933.)

1. **Receivers F b—Permission must be obtained for suit against receivers on cause of action arising prior to receivership.**

   In an action against a railroad company for wrongful death occurring prior to the receivership of defendant company it is necessary for plaintiff to obtain permission to sue from the Federal Court appointing the receivers, U. S. C. A., sec. 125 giving permission to sue only for causes of action arising from the negligence of the receivers or their agents.

2. **Same—Order appointing receivers held not to grant leave to sue receivers on cause of action arising prior to receivership.**

   The order appointing receivers for the Norfolk Southern Railroad Company does not give permission for suit against the receivers for wrongful death occurring prior to the receivership, the powers given the receivers by the order in respect to instituting and defending suits not amounting to a leave of court to institute such action.

3. **Process B a: Appeal and Error J c—**

   Where there is no evidence to support the finding of the trial court that the person upon whom service was served was an agent of defendant corporation at the time of the service of summons, the refusal of the corporation's motion to dismiss for failure of service of summons, entered upon its special appearance, will be reversed.

CIVIL ACTION, before *Cranmer, J.*, at November Term, 1932, of LENOIR.

Plaintiff alleged that her husband, the intestate, was injured and killed on 26 November, 1931, by reason of the negligence of the agents and employees of the Carolina Railroad Company and the Norfolk Southern Railroad Company. On 28 July, 1932, the judge of the District Court of the United States for the Eastern District of Virginia, by order, duly made and entered, placed the defendant, Norfolk Southern Railroad Company in receivership and appointed the defendants, G. R. Loyall and L. H. Windholz, as receivers of said company.

The summons was issued by the plaintiff on 14 September, 1932, and was served 15 September, 1932, on W. J. Nicholson, "agent for Norfolk Southern Railroad Company, and W. J. Nicholson, agent for G. R. Loyall and C. H. Windholz, receivers of Norfolk Southern Railroad Company." The summons for the Carolina Railroad Company was issued on 14 September, 1932, and served 15 September, 1932, upon "J. C. Poe, superintendent and agent for Carolina Railroad Company." The Carolina Railroad Company is a corporation of North Carolina. Thereafter, the Norfolk Southern Railroad Company made a special appearance and moved to dismiss the action for that there had been no proper service of summons for the reason that "neither J. C. Poe nor W. J. Nicholson, the parties on whom the summons in this case was served, is now, was when said summons was served, nor has been, since 28 July, 1932, an officer, agent, servant or employee of Norfolk Southern Railroad Company, but are now, were when said summons was served, and have been, since 28 July, 1932, in the employment of G. A. Loyall and L. H. Windholz, receivers of Norfolk Southern Railroad Company, and, therefore, were not the parties on whom process against Norfolk Southern Railroad Company could be served according to the statute of North Carolina."

At the same time the receivers of the Norfolk Southern Railroad Company made a special appearance and filed a like motion to dismiss the action upon the same ground, and upon the further ground that the plaintiff had not procured a leave of the Federal Court to institute said suit, and that the order appointing the receivers "does not permit the said receivers to be sued for any alleged acts of the corporation, Norfolk Southern Railroad Company, accruing prior to their appointment, without the express approval and consent of the District Court of the United States for the Eastern District of Virginia."

The defendant, Carolina Railroad Company, made a special appearance and filed a motion to dismiss upon the ground that summons had been served upon J. C. Poe, and that J. C. Poe was not an officer, agent, servant or employee of the Carolina Railroad Company at the time of the issuance and service of summons, and had not been such agent since 28 July, 1932.

The motions so made by the defendants were supported by affidavit of J. C. Poe, who declared therein that he was not an agent of the Carolina Railroad Company on 15 September, 1932. The plaintiff offered the affidavit of R. A. Whitaker to the effect that J. C. Poe was superintendent of the Carolina Railroad Company at the time of plaintiff's death in November, 1931, and that affiant had conducted certain correspondence with J. C. Poe with reference to the settlement of plaintiff's claim, beginning in February, 1932, and terminating on 13 May, 1932. The letters of Poe to plaintiff's attorneys bear the legend "Carolina Railroad Company, J. C. Poe, superintendent." There was no communication between the plaintiff and Poe subsequent to 13 May, 1932, and no evidence tending to show any official act of Poe subsequent to 28 July, 1932, when the receivership order was signed. Plaintiff offered the affidavit of F. E. Wallace, stating that as late as 3 June, 1932, "J. C. Poe was the acting superintendent of the Carolina Railroad Company, and as such was making efforts to dispose of the property of the said Carolina Railroad Company and was in charge thereof."

Upon the motions and affidavits the trial judge was of the opinion that summons had been properly served on both defendants and found that Poe "was the superintendent and agent of said Carolina Railroad Company . . . and W. J. Nicholson was agent for the receivers of the Norfolk Southern Railroad Company at the time the summons was served."

From the foregoing judgment the defendants appealed.

Whitaker & Allen and Wallace & White for plaintiff.
Rouse & Rouse for defendants.

BROGDEN, J. (1) Was it necessary for the plaintiff to obtain leave of the Federal Court, permitting or allowing this action for wrongful death to be instituted?

(2) Does the order appointing the receivers for the Norfolk Southern Railroad grant such necessary leave or permission?

(3) Was there any evidence that J. C. Poe was agent of the Carolina Railroad Company at the time the action was instituted, to wit, 14 September, 1932?

U. S. C. A., section 125, provides that "every receiver . . . of any property appointed by any court of the United States may be sued in respect to any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver . . . was appointed, etc." Hence the inquiry arises: Was the death of plaintiff's intestate caused by the receivers or their agents, or was the alleged negligent killing of plaintiff's intestate "any act or transaction of his in carrying on the business connected with such property," etc.? It was alleged that the plaintiff's intestate was killed on 26 November, 1931. The receivers were appointed in July, 1932. Consequently the cause of action existed before the appointment of the receivers, and, therefore, such alleged negligent killing could not be due to any act or transaction of the receivers "in carrying on the business connected with such property." The plaintiff insists that the receivers can be sued for wrongful death without leave of court, although the cause of action arose prior to the appointment of receivers, and cites in support of such contention *Grady v. R. R.,* 116 N. C., 952, 21 S. E., 304; *Wilson v. Rankin,* 129 N. C., 447, 40 S. E., 310; *Lassiter v. R. R.,* 163 N. C., 19, 79 S. E., 264. It is to be noted, however, that in all of said cases the alleged wrongful death complained of occurred during the pendency of the receivership. Manifestly, leave of court was necessary when the cause of action arose several months prior to the order of receivership. See *Oklahoma v. Texas,* 265 U. S., 490, 68 L. Ed., 1116; *Texas & Pacific R. R. v. Cox,* 145 U. S., 593, 36 L. Ed., 829.

The next question of law to arise is whether the order of receivership granted leave of court to institute the action. Said order after authorizing the receiver to institute and prosecute "all such actions, proceedings or suits as in his judgment may be necessary for the recovery or proper protection of said property" proceeds as follows: "and likewise to appear in and defend any and all actions, proceedings, or other suits which may be instituted and prosecuted against him as receiver in or before any such tribunal. Said receiver is further authorized and empowered whether before or after any action, proceeding or suit in respect thereof shall have been begun, to compromise and settle, and out of funds coming into his hands as receiver, pay claims and demands on all accounts accruing against him as receiver after the date of this order and arising out of his possession, maintenance or operation of the property of the railroad company." The order further provides: "Said receiver is also authorized and empowered to appear in and conduct prosecution or defense of any and all actions, proceedings or suits now pending or which may hereafter be brought in any court . . . in which the railroad company is or shall be a party. . . . Said receiver is further authorized and empowered, whether before or after any action, proceeding or suit in respect thereof shall have been begun, to compromise and settle claims and demands of all accounts which have accrued against the Railroad Company or which have arisen out of the possession, maintenance and operation by the Railroad Company of its property."

Reducing the language of the order to concrete propositions, it appears that the receivers are authorized (a) to appear and defend any and all actions prosecuted against them as receivers; (b) to compromise and settle claims arising out of possession, maintenance or operation of the property of the Railroad Company; (c) to appear and defend all pending suits or those thereafter instituted, affecting the property in the custody of the receivers.

As the court interprets the order, the wording thereof is not broad enough to constitute a general leave of court to any particular claimant to assert a liability arising prior to the appointment of the receivers. Indeed, the order is a delegation of power to the receivers and a direction as to the performance of their duties rather than an invitation to claimants to enter suits. Therefore, the court is of the opinion that the order of receivership cannot be reasonably interpreted as a specific permission to the plaintiff to institute this action.

The third question of law relates to the service upon the defendant, Carolina Railroad Company. The trial judge found as a fact that on 15 September, 1932, when the summons was served on J. C. Poe that he was then agent of the Carolina Railroad Company. However, there is no evidence in the record of such agency subsequent to June, 1932. Hence the motions made by the defendants must prevail.

Reversed.

EDITH C. BISCHOFF DODDS v. ST. LOUIS UNION TRUST COMPANY AND E. W. GROVE, JR., TRUSTEES UNDER THE WILL OF E. W. GROVE ET AL.

(Filed 20 September, 1933.)

1. **Easements A b—Deed to lot in development carried easements in streets and improvements but created no right to maintenance of improvements.**

The purchaser of lands in a "model village" development project, while she may be a dominant tenant over the streets laid out and in respect to other improvements contemplated, cannot by her purchase acquire a right as against her grantor for the continuous maintenance and upkeep of the contemplated improvements in the absence of an express contractual agreement to that effect, and the provisions of the deed in this case excepting rights of way for water and sewer lines to the grantee were inserted for the protection of the grantee and did not constitute a contract for such maintenance.

2. **Deeds and Conveyances C f—Contract of sale held not to embrace maintenance of improvements in development in which lot was situate.**

The owner of lands laid them out into streets with water and sewer systems and other improvements, advertising that the development was a bold experiment in scientific town planning and contemplated the creation of a "model village," and sold one of the lots to the plaintiff after having proceeded with the proposed physical development, the plaintiff then being satisfied, but becoming subsequently dissatisfied when the improvements were not maintained: *Held*, plaintiff cannot maintain an action for breach of contract in the sale of her lot for failure to maintain the improvements, there being no evidence that the contract of the parties covered the continued maintenance of the improvements, or that the grantor's agents were authorized to make agreement to that effect.

3. **Contracts A b—Offer and acceptance in same terms and mutuality of agreement are essential to legal contract.**

An offer and acceptance in the same terms are the foundations of an enforceable contract, and to this end the offer must be communicated and accepted in exact terms and same sense, for the necessary mutuality of agreement of the parties.

CLARKSON, J., concurring.

APPEAL by plaintiff from judgment of nonsuit by *Alley, J.,* at March Term, 1933, of BUNCOMBE. Affirmed.

The following is an abridged statement of the cause of action. In 1925 E. W. Grove undertook the development near Asheville of a residential subdivision of his property to be known as Grovemont-on-Swannanoa. He laid off alleys and streets, had some of them paved, installed lines for water and sewage, and represented to the plaintiff, as an inducement to her purchase of a lot, that the village should be modern, and that he and his representatives would maintain the alleys, streets, water and sewer system, parks and squares, and shrubbery and grass for the benefit of the residents and owners of property. On 26 March, 1925, the plaintiff bought one of the lots, left the county in 1929, and returned in June, 1932, finding that her property was not satisfactory inasmuch as it had not been maintained and kept in repair.

The plaintiff filed an amended complaint seeking upon relevant allegations to enjoin the transfer of the water and sewer system to the Swannanoa Water and Sewer District.

The defendants filed answers, the cause came on for hearing, and at the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit. The plaintiff excepted and appealed.

R. E. Finch and Weaver & Miller for plaintiff.
Merrimon, Adams & Adams and Clinton K. Hughes for defendants.

ADAMS, J. The cause of action is an alleged breach of contract by the defendants; all other questions are waived except such as relate to the application for an injunction, and these are ancillary. The primary breach, as averred by the plaintiff, is the failure of the defendants to maintain the "model village" as originally planned and laid out, according to the terms of the agreement set forth in the complaint. In their answers the defendants deny, not only the breach, but the execution of the asserted contract.

The plaintiff received her deed for the lot in question from E. W. Grove on 26 March, 1925, and at that time she was "entirely satisfied" with her purchase and her property. Her dissatisfaction arose at a later date. It may be granted that by virtue of her deed she acquired certain easements and that her lot became the dominant tenement with respect to her rights and privileges as described in her conveyance; but unless there was an agreement to that effect the servient tenement was not obligated to maintain such easements or to keep them in repair. *Richardson v. Jennings,* 184 N. C., 559; *Lamb v. Lamb,* 177 N. C., 150. The deed expressly excepts rights of way for water and sewer lines with privilege reserved to the grantor and his representatives to occupy the rights of way for the purpose of constructing and repairing the lines; but this stipulation was necessary for the protection of the grantor and his trustees, owners of the greater part of the property, and was evidently inserted primarily for their benefit and not as a contractual right of the grantee.

As stated in the complaint the cause of action is founded specifically upon certain representations said to have been made by E. W. Grove chiefly in circulars and newspapers, but in part by his agents and salesmen, to the public generally and particularly to the plaintiff. He represented, so the plaintiff alleges, that he owned a large watershed on the property from which he would furnish for the residents of the village pure spring water already stored in a reservoir in the mountains; that he would transform the property into a modern village; and that he would maintain the village with all its improvements for residential purposes. These are the material allegations, but the advertisements offered in evidence were nothing more than the statement of a proposed plan for the development of the property: engineers had surveyed the site, streets had been graded, water had been provided, electric lines were under construction. The scheme was described as "a bold experiment in scientific town planning"; as an example of what a municipality can be when planned by experts; as an idea of beautifying a thousand acres of land. The duty of the agents and salesmen was merely to show the property to prospective purchasers of the lots.

The evidence falls short of a contract on the part of E. W. Grove or his trustees to perpetuate or maintain the village as at first laid out or as it was constructed when the plaintiff made her purchase. It is revealed by the plaintiff's evidence that the indefinite maintenance of the improvements was not contemplated in the contracts of sale and that the salesmen were not authorized to make any agreement to that effect.

In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. *Gravel Co. v. Casualty Co.,* 191 N. C., 313; *Rucker v. Sanders,* 182 N. C., 609. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu,* and their minds must meet as to all the terms. *Croom v. Lumber Co.,* 182 N. C., 217.

The application of this principle defeats the plaintiff's recovery for breach of contract. Neither in the advertisements nor in negotiations with the salesmen was there an offer by Grove to keep up and maintain the improvements in the village and hence no acceptance of such an offer by the plaintiff. The "experiment in scientific town planning in anticipation of fifty years' growth" may or may not have been a fantastic conception, but like many other "best-laid schemes" it seems to have failed of its purpose, apparently to the indiscriminate detriment of all who were financially interested in its success.

There are several exceptions to the admission and rejection of evidence but none of sufficient gravity to justify a new trial.

As the judgment of nonsuit is sustained the cause stated in the amended complaint necessarily fails. Judgment

Affirmed.

CLARKSON, J., concurring: I concur in the opinion of *Mr. Justice Adams,* but there is a feature that I desire to stress. The complaint alleges: "The said defendants have permitted the said community to become dilapidated in appearance, permitting one of the lakes, which was advertised as a major attraction in the exploitation of the said lands, to be drained off, and the same has become unsanitary, and threatens to become a menace to health, and a nuisance generally, all to the great damage of this plaintiff," etc.

This aspect of the complaint is indefinite and uncertain. I think the law well settled that if defendants own and control the lake and allow or permit it to be a menace to health, and a nuisance to the neighborhood and those who own property and live around it are materially affected by the bad and noxious odors, etc., plaintiff would have a cause of action against defendants. See *Snell v. Chatham,* 150 N. C., 729; *Swinson v. Realty Co.,* 200 N. C., 276; *Holton v. Oil Co.,* 201 N. C., 744.

FRANCES MARTIN v. ULYSSES MARTIN ET AL.

(Filed 20 September, 1933.)

1. **Process B c—Affidavit for service by publication must show cause of action against defendant and that he has property in this State.**

   In order to a valid service by publication it is required that the statutory affidavit, besides showing that the defendant cannot be found in the State after due diligence, must show that a cause of action exists against such defendant or that he is a proper party to an action involving real estate, and that such defendant has property in this State and the court has jurisdiction. C. S., 484.

2. **Same—Defective affidavit for service by publication may be aided by verified complaint filed simultaneously.**

   Where the statutory affidavit filed upon motion for service of a defendant by publication is deficient in that it fails to state the cause of action against such defendant with sufficient definiteness, and fails to aver that the defendant has property in this State, plaintiff's verified complaint, filed at the time of the affidavit may be considered as an affidavit upon which such process may issue where the defects of the affidavit are supplied by the complaint, and a complaint in an action to set aside a deed to the defendant for condition broken sufficiently alleges that defendant owned property in this State, although the complaint alleges that plaintiffs were the owners of such property, the title to such property remaining in defendant until the deed is set aside.

3. **Judgments D a—Plaintiffs held not entitled to judgment by default final against one defendant, the other defendant's rights intervening.**

   Where action is instituted against a husband and his wife to set aside a deed made to the husband on the ground that the deed failed, through mutual mistake of the parties, to contain a provision that the grantee should support and maintain the grantors for their lives, and that the condition had been broken, and the husband is served by publication, and it appears that the wife had obtained an order for alimony and counsel fees in her action against her husband for divorce, and had had a commissioner appointed to sell the land upon the husband's failure to comply with the order: *Held*, plaintiffs would not be entitled to a judgment by default final against the husband upon his failure to answer the complaint after due service by publication, it appearing that the wife would suffer serious disadvantage if it should be determined that the husband had no interest in the land at the time of the institution of the action, or if there was collusion between plaintiffs and the husband.

APPEAL by plaintiff from *Parker, J.*, at February Term, 1933, of BEAUFORT. Error.

P. H. Bell for appellant.
Harry McMullan for appellee.

ADAMS, J. On 23 October, 1926, Joseph Martin and his wife Frances, holding title to land as tenants by the entirety, executed and delivered to their son Ulysses Martin a deed which purported to convey their interest in the premises. Thereafter the grantee's wife brought suit against him for absolute divorce and in 1929 obtained an order for alimony and an allowance as a fee for her attorney. Upon the husband's failure to comply with the order the court appointed a commissioner to advertise and sell the land described in the grantee's deed. A few days afterwards Joseph Martin and his wife instituted an action against Ulysses Martin, his wife Louvenia Martin, and the commissioner appointed by the court, for the purpose of reforming and canceling their deed, alleging that as a condition precedent to its execution Ulysses Martin agreed to provide them with food, raiment, and "all necessaries" as long as they lived; that he had failed to comply with his agreement; that the condition had been left out of the deed by the mistake of the draftsman and the mutual mistake of the parties; and that Louvenia Martin had knowledge of these facts.

For the purpose of serving Ulysses Martin with summons, Joseph Martin made an affidavit that he had instituted an action against the defendants, that Ulysses was a nonresident of the State and a necessary party to the action, that summons had been issued and returned by the sheriff with the endorsement that Ulysses Martin was not to be found in Beaufort County, and that after due diligence he could not be found in the State of North Carolina. Pursuant to this affidavit the clerk of the Superior Court "ordered and adjudged that notice of said action be given by publication as in such cases allowed and prescribed by law." The notice was published. Thereafter Joseph Martin died and his widow, the present plaintiff, prosecuted the action in her own right as surviving tenant.

At the close of her testimony the plaintiff made a motion for judgment by default final against Ulysses Martin on the ground that he had not filed an answer to the complaint. The court denied the motion, holding that there had been no valid service of the summons by publication on Ulysses Martin, and adjudged that as to him the action be dismissed. The plaintiff excepted and appealed.

The judgment sets forth as the two fatal defects in the affidavit the absence or omission of a statement of the cause of action and of an averment that the defendant has property in North Carolina.

It is provided by statute that where the person on whom the service of summons is to be made cannot after due diligence be found in the State and that fact satisfactorily appears by affidavit, and that it appears in like manner that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this State, the court may grant an order that service be made by publication . . . "where the defendant is not a resident but has property in this State and the court has jurisdiction of the subject of the action." C. S., 484.

Unless these provisions are observed the service of a summons by publication in such cases will be ineffective. Not only must it be shown that the defendant has property in this State; the cause of action must be stated with such clearness and comprehension as may enable the court to determine its sufficiency. *Spiers v. Halstead,* 71 N. C., 209; *Bacon v. Johnson,* 110 N. C., 114. The affidavit of Joseph Martin, upon which the order of publication of the summons is based, contains neither of these requisites and is consequently defective. But it is suggested in *Bacon v. Johnson* that the defect may be cured; and in later cases it has been held that if a verified complaint containing the necessary allegations be filed simultaneously with the affidavit, the complaint may be treated as an amendment or complement which cures the defect. *Davis v. Davis,* 179 N. C., 185; *Bank v. Tolbert,* 192 N. C., 126.

The record shows that the affidavit and the verified complaint bear the same date and were on file when the clerk signed the order directing publication of the summons and that the plaintiffs requested the court to consider the complaint as an affidavit upon which process should be issued. The complaint sets out a cause of action: the execution and delivery of the deed to the defendant Ulysses Martin, the condition upon which it was executed, the omission of the condition from the deed by the mistake of the draftsman and the mutual mistake of the parties, and its breach by the grantee. As between the plaintiff and this defendant the title remains in the latter until the deed is set aside; the mere allegation that the plaintiffs were the owners of the land is not conclusive. The complaint, therefore, contains a sufficient allegation that Ulysses Martin has property in this State.

There was error in dismissing the action; but it does not necessarily follow that the plaintiff is entitled to judgment by default. The record does not contain all the pleadings and we are not permitted to consider the defenses referred to in the brief of the appellees. If it is established, as the brief of the appellees intimates, that Ulysses Martin had no interest in the land when this action was instituted the plaintiff would derive no benefit from a judgment by default and Louvenia Martin might suffer a serious disadvantage. So, likewise, if in fact there was collusion between the plaintiff and her son. *Carraway v. Stancill,* 137 N. C., 472.

It may be noted that *Branch v. Frank,* 81 N. C., 180, *Parks v. Adams,* 113 N. C., 473, and *Foushee v. Owen,* 122 N. C., 360, cited in the plaintiff's brief apply to affidavits in attachment. These cases point out the inadvertent statement in *Spiers v. Halstead,* 71 N. C., 209 and *Windley v. Bradway,* 77 N. C., 333.

Error.

IN THE MATTER OF W. T. CROSS AND C. M. EARLEY, EXECUTORS OF W. H. HILL, DECEASED.

(Filed 20 September, 1933.)

1. **Wills E a—**

In the construction of wills there is a presumption against intestacy.

2. **Same—**

In the construction of a will the intention of the testator as expressed in the will, construing the will as an entirety, will be given effect.

3. **Wills E b—Under the language of the will in this case, testator died intestate as to certain funds coming into hands of his executor.**

The will in this case directed that the executor sell the testator's "Chattel property" and give the proceeds of the sale to testator's wife. There was no residuary clause in the will. *Held,* the word "chattel" embraced only movable personal property, and as to certain funds coming into the hands of the executor the testator died intestate, and such funds should be distributed among his heirs at law according to the canons of descent.

APPEAL by respondents, Minnie Bunch Hill, widow of W. H. Hill, and executors of W. H. Hill, from *Small, J.,* at April Term, 1933, of GATES. Affirmed.

The will in controversy to be construed, is as follows:

"16 December, 1925.

North Carolina—Gates County.

I, William Holmes Hill, being of sound health and good mind do hereby make and declare this to be my last will and testament.

Item 1. I hereby give and bequeath to my wife Minnie Bunch Hill, the Walter Hinton place on which I now live, for her natural life, at her death it shall go to my sons W. P. Hill and Waverly H. Hill, in fee simple, both sharing equal parts.

Item 2. I hereby give and bequeath to my two sons W. P. Hill and Waverly H. Hill in fee simple the place that I now own known as my old home place, the same being across the road from the Hinton place. Both sharing equal parts.

Item 3. I hereby give and bequeath to each of my children as follows: W. P. Hill, P. H. Hill, Herman Hill, Tucker L. Hill, Simon J. Hill, Clyde F. Hill, Ellen Hill Pierce, Hattie V. Hill and Waverly H. Hill, Ethel Hill and Maywood Hill, the children of Clabourne Hill, the sum of five dollars each.

Item 4. I hereby give and bequeath to Maywood Hill and Ethel Hill, children of Clabourne Hill one note of eleven hundred and fifty dollars, that I now hold.

Item 5. All my chattel property shall be sold at public sale and after paying all debts, including burial expenses, and the proceeds from which I do hereby and bequeath to my wife, Minnie Bunch Hill.

Item 6. The burial grounds on my home place, on which my former wives are buried, and where I wish to be buried, is hereby exempt from the above, with right of ingress and egress.

Item 7. I hereby appoint Charles M. Earley and William T. Cross to act as administrators on my estate.

Witness my hand and seal this 16 December, 1925.

Witness: S. P. Cross.
Witness: E. L. Riddick.
Witness: N. J. Riddick."

The court below rendered the following judgment:

"This cause coming on to be heard, on this, 12 April, 1933, before his Honor, W. L. Small, at Edenton, N. C., upon appeal of L. Tucker Hill and others, children, or the representatives of deceased children, of said W. H. Hill, deceased, from an order of the clerk of Superior Court of Gates County, directing the distribution of certain proceeds of the estate of said W. H. Hill, deceased, now in the hands of his executors, as shown by their final account; and all parties being before the court and consenting to the hearing at such time and place; and the cause having been heard upon a 'statement of agreed facts' upon which, and in accordance with which, it was further consented by all parties that judgment should be pronounced;

And it appearing to the court that, since the execution of the will of W. H. Hill, deceased, Ellen Hill Pierce has died, leaving her surviving as her sole distributees, two children, viz.: Earl Pierce and Maywood Pierce;

Now, therefore, it is ordered, adjudged and decreed that Ethel Hill, Maywood Hill, P. H. Hill, H. R. Hill, L. Tucker Hill, Earl Hill, Maywood Pierce, W. P. Hill, Samuel J. Hill, Clyde F. Hill, Hattie V. Walters (formerly Hattie V. Hill), and Waverly H. Hill recover of W. T. Cross and C. M. Earley, executors of W. H. Hill, deceased, the sum of $55.00, which said sum said executors shall forthwith pay to them singly as follows, to wit: to Ethel Hill, Maywood Hill, P. H. Hill, H. R. Hill, Samuel J. Hill, Clyde F. Hill, Hattie V. Walters and Waverly Hill, the sum of $5.00 each; and to Earl Pierce and Maywood Pierce the sum of $2.50 each. It is further ordered, adjudged and decreed that said Ethel Hill, Maywood Hill, P. H. Hill, H. R. Hill, L. Tucker Hill, Earl Pierce, Maywood Pierce, W. P. Hill, Samuel J. Hill, Clyde F. Hill, Hattie V. Walters (formerly Hattie V. Hill), and Waverly H. Hill, recover of said executors the further sum of $2,024.90, which said executors shall pay to them singly as follows, to wit: to P. H. Hill, H. R. Hill, L. Tucker Hill, W. P. Hill, Samuel J. Hill, Clyde F. Hill, Hattie V. Walters and Waverly H. Hill, one-tenth each of said amount, that is to say one-tenth each of $2,024.90; and to

Ethel Hill, Maywood Hill, Earl Pierce and Maywood Pierce one-twentieth each of said amount.

It is further ordered, decreed and adjudged that Minnie Bunch Hill recover of said executors the sum of $1,521.25, which said executors shall forthwith pay over to her.

It is further ordered, that L. Tucker Hill and others, movants in this proceeding, recover their costs thereof, to be taxed by the clerk.

(Signed.) WALTER L. SMALL, *Judge Presiding.*"

To the foregoing judgment, the respondent, Minnie Bunch Hill and the executors of W. H. Hill, excepted, assigned error and appeal to the Supreme Court.

John H. Hall for respondents, appellants.
A. P. Godwin and McMullan & McMullan for appellees.

CLARKSON, J. The question presented: Did certain funds which came into the hands of the executors of W. H. Hill pass under his will to his widow, Minnie Bunch Hill, one of the appellants, or did the said W. H. Hill die intestate with reference thereto? We think the said W. H. Hill died intestate as to the funds in controversy.

The determination of the controversy depends upon the construction to be given the will of W. H. Hill, deceased, and particularly to Item 5 thereof, which is as follows: "All my *chattel* property shall be sold at public sale and after paying all debts, including burial expenses, *and the proceeds from which* I do hereby and bequeath to my wife, Minnie Bunch Hill."

There are certain well recognized rules of construction of wills. "It is an established rule of law that the presumption is, when a party makes a will that he disposes of his entire estate, and so intends. . . . The question is not what the testator intended to express, but what he actually expressed in his will, when all its provisions are considered and construed in their entirety. . . . Usually there is a residuary clause in a will which generally deals with all property not before disposed of in the will." *Kidder v. Bailey,* 187 N. C., 505, 507. In the will in the instant case there is no residuary clause.

In the present case, Item 5 deals with the proceeds arising from the sale of certain designated kind of property—chattel. What is the meaning of chattel?—"An article of personal property . . . movables which are called 'chattels personal.'" Black's Law Dictionary, 2d ed., p. 194.

We think in the instant case "chattel property" would indicate that the testator by the use of the words meant movables, which is the generally accepted meaning of chattels. We think the language in the will in the present case is distinguishable from that in *Hogan v. Hogan,* 63 N. C., 222, and *Harkness v. Harkey,* 91 N. C., 195, chiefly relied on by appellants.

In the *Hogan case, supra,* there was a residuary clause. After several specific bequests, there is the following: "And should there be anything at my death undivided, it is my wish that it be sold and equally divided among my four sons, after paying my funeral expenses and all just debts."

In the *Harkness case, supra,* there was a residuary clause "that the remainder of my property be sold and equally divided," etc. In these two cases it is clear that the testator did not intend to die intestate as to anything. The language in these cases is broad and comprehensive in its meaning, and no purpose to use same in a restricted sense, as in the instant case. For the reasons given, the judgment of the court below is

Affirmed.

INDUSTRIAL DISCOUNT CORPORATION v. OSCAR RADECKY, C. N. BURNETT, SHERIFF, LYON DAWSON GARMENT COMPANY, AND PAUL THOMPSON.

(Filed 20 September, 1933.)

1. **Chattel Mortgages B b—Provision that mortgage be registered in county of mortgagor's "residence" means actual residence and not domicile.**

   The meaning of the term "residence" depends upon the connection in which it is used, and the term is not synonymous with "domicile," and the term as used in our statute requiring the registration of a chattel mortgage in the county in which the mortgagor resides, or if the mortgagor is a nonresident, in the county in which the property is situated, to be effective as against creditors and purchasers for value, C. S., 3311, is the actual personal residence of the mortgagor, and the instruction in this case, construed as a whole, properly submitted to the jury upon conflicting evidence whether the mortgagor was a resident of the county in which the mortgage was recorded or a nonresident with his domicile in another state.

2. **Appeal and Error J e—**

   In an action involving the residence of one of the parties an exception to the introduction in evidence of a contract between the party and a third person, describing the party as being of a city in another state, is not sustained.

APPEAL by plaintiff from *Alley, J.,* at April Term, 1933, of MADISON. No error.

This is a proceeding in claim and delivery for the possession of a Dodge truck for the purpose of sale under a mortgage. On 26 July, 1932, Oscar Radecky executed a chattel mortgage conveying the truck to the plaintiff as security for a loan of $250.00. The mortgage was registered in Buncombe County on the first day of August, 1932; it has never been registered in Madison. When the mortgage was registered the truck was in Madison County and has been there ever since.

After the registration of the mortgage in Buncombe the Lyon Dawson Garment Company obtained a judgment in Madison against Radecky for $192.73 with interest, had it docketed, and issued an execution thereon which was levied on the truck by the sheriff of Madison; and Paul Thompson, after the registration of the mortgage caused a warrant of attachment in the sum of $96.00 to be levied by the sheriff of Madison on the same property. The mortgagor was in default when the plaintiff instituted its action. By agreement of the parties only one issue was submitted to the jury, the verdict being as follows: "Was the mortgagor, Oscar Radecky, a nonresident of the State of North Carolina at the date of the execution of the mortgage in question, to wit, 26 July, 1932? Answer: Yes."

Judgment for defendants; appeal by plaintiff.

Alvin S. Kartus for appellant.
John A. Hendricks and Mack E. Ramsey for appellees.

ADAMS, J. It is provided by statute that no mortgage for personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the mortgagor but from the registration of such mortgage in the county where the mortgagor resides, or in case the mortgagor resides out of the State, then in the county where the personal estate or some part of it is situated; or in case of choses in action where the mortgagee resides. C. S., 3311. According to the verdict Radecky, the mortgagor, was a nonresident of North Carolina when he gave the plaintiff the mortgage in controversy; and if he was, the mortgage should have been registered in Madison County. *Weaver v. Chunn,* 99 N. C., 431; *Bank v. Cox,* 171 N. C., 76; *Sloan Bros. v. Sawyer-Felder Co.,* 175 N. C., 657. It was registered only in Buncombe; and the court adjudged that the plaintiff take nothing by its action. It is obvious that the judgment is final unless error was committed in the trial.

The appellant attacks the instructions given the jury on the ground that the presiding judge predicated the rights of the parties upon the legal residence or permanent residence of the mortgagor as distinguished from his actual personal residence. In this position we do not concur.

The term "residence" has no fixed meaning which is applicable to all cases, its definition in a particular case depending upon the connection in which it is used and the nature of the subject to which it pertains. *Chitty v. Chitty,* 118 N. C., 647; *Brann v. Hanes,* 194 N. C., 571. It is not technically synonymous with "domicile." The latter imports the residence at a particular place of a person who intends to remain there permanently, or for an indefinite length of time, or until some unexpected event shall occasion his departure. The *animus manendi* must be coincident with the actual residence. *Reynolds v. Cotton Mills,* 177 N. C., 412. Domicile is a person's fixed, permanent dwelling-place as distinguished from his temporary, although actual, abode. *Roanoke Rapids v. Patterson,* 184 N. C., 135.

It is said in *Weaver v. Chunn, supra,* that the purpose of section 3311 is to have a chattel mortgage on personal property registered in the county where the mortgagor, if a resident of the State, has his actual personal residence, so that interested persons may be informed as to the records which are designed to show any encumbrance or disposition of his property.

On the question of the mortgagor's residence the evidence is conflicting. For the plaintiff there is testimony which would have justified a finding that Radecky was a resident of Asheville when he executed the mortgage, and for the defendants, that his domicile was in Kansas and that he was a nonresident of North Carolina. The issue was determined by the jury upon a charge which contains no reversible error. The specific instruction as to "residence" must be construed in connection with the explanation that the word signifies the actual personal residence of the mortgagor and not necessarily his domicile, or legal residence, as the plaintiff contends.

The exception taken to the introduction of a contract between Radecky and the Marshall Mill Company executed in January, 1932, in which the party of the second part is described as "Oscar Radecky, of Kansas City" does not constitute ground for a new trial and cannot be sustained. Upon inspection of all the exceptions we find

No error.

ROWLAND H. WALKER ET AL. v. ASHEVILLE BUILDING SECURITIES COMPANY AND ARTHUR O'BRIEN.

(Filed 20 September, 1933.)

1. **Pleadings D d—**

By answering the complaint defendant waives defects appearing upon the face thereof.

2. **Pleadings D b—Demurrer for misjoinder of parties and causes held properly overruled in this case.**

Plaintiff bondholders brought action against the company issuing the bonds and an individual defendant, alleging that the individual defendant had purchased some of the bonds and given the issuing company's note therefor endorsed by him, and deposited the note and the bonds for the benefit of plaintiff bondholders and had promised plaintiff bondholders that he would pay the taxes assessed against the property, that he failed to do so, but that he procured the county and city authorities to foreclose the property for the taxes and thereafter had the county's bid at the sale assigned and deed executed to him. Plaintiffs seek primarily to set aside the tax foreclosure sale, and to have the property sold under their deed of trust and further to have the proceeds of the sale of the property, after deducting taxes, applied to the payment of the company's note given for the purchase price of the bonds and endorsed by the individual defendant. *Held,* there was no fatal misjoinder of parties and causes of action, and the individual defendant's demurrer on that ground was properly overruled.

CIVIL ACTION, before *Alley, J.,* at April Term, 1933, of BUNCOMBE.

The original complaint alleged that on 15 March, 1926, the defendant, Asheville Building Securities Company, executed and delivered to the Citizens Bank of Norfolk, trustee, a deed of trust upon a certain apartment house in Asheville to secure bonds in the sum of $150,000. The plaintiffs other than A. P. Grice, trustee, are the holders of said bonds in due course, and A. P. Grice is the duly substituted trustee in said deed of trust. It further alleged that in July, 1930, the defendant, O'Brien, purchased $115,000 worth of said bonds and in payment of the purchase price executed and delivered the promissory note of the Asheville Building Securities Company in the sum of $57,500, payable to the Norfolk Bank of Commerce and Trust for the benefit of the bondholders "in proportion to their respective interests in said bonds and pledged as security for said collateral note all of said bonds of the Asheville Building Securities Company purchased by the said Arthur O'Brien as hereinbefore set forth, and the said Arthur O'Brien personally endorsed said promissory collateral note," etc. It was further alleged that the said note for $57,500 was renewed from time to time and that on or about 15 June, 1931, as a cause of extension of payment the said O'Brien agreed with the plaintiff bondholders that he would pay all past due taxes of the Asheville Building Securities Company on the property described in the deed of trust, and that thereafter on 28 January, 1932, said O'Brien notified the plaintiffs that he was sending "his check for $3,352.08 in payment of the taxes for the year 1928," etc. It was further alleged that at the time the said O'Brien was receiving all the rents and profits of all of said Asheville Building Securities Company, and that he falsely and fraudulently procured the board of commissioners of Buncombe County to institute a tax foreclosure sale of the property described in the deed of trust and succeeded in procuring Buncombe County to institute a foreclosure suit against the Asheville Building Securities for the collection of 1928 taxes; that in said proceeding a commissioner was appointed to sell the land, and at the sale the property was purchased by the board of commissioners of Buncombe County, and thereafter said bid was duly assigned to O'Brien and a deed for the property executed and delivered to O'Brien. It is further alleged that said tax foreclosure proceeding was void in various particulars specified in the complaint. Wherefore, the plaintiffs prayed that the deed from the commissioner to Arthur O'Brien for the property be declared void, and that all the decrees, notice and judgment in the attempted tax foreclosure proceeding be declared void, and that Grice, trustee in the deed of trust, be declared the legal owner of the property.

The defendant, O'Brien, filed an answer admitting certain allegations of the complaint and denying others, and alleged that he was the owner of notes aggregating $55,956.65 secured by a second deed of trust upon the apartment house or property described in the complaint, and further that he held a valid title to said property in his own right by virtue of a deed in a tax foreclosure suit referred to in the complaint.

The cause came on for hearing before Judge McElroy, who ordered a mistrial and granted the plaintiffs time to file an amended complaint and the defendants time to file an amended answer. Pursuant to the order so made the plaintiffs filed an amended complaint setting out the bonds in detail, and also the note for $57,500 heretofore referred to, and asked that the deed of trust to Grice, trustee, be foreclosed, and that the plaintiffs recover from O'Brien the sum of $57,500 after crediting the proceeds of said foreclosure sale, and that whatever taxes should be found to be due upon the property should be paid from the proceeds of said foreclosure sale. Plaintiffs further ask that they recover from O'Brien all past due taxes remaining unpaid.

The defendant, O'Brien, demurred to the amended complaint upon the ground of misjoinder of parties and causes of action. The trial judge overruled the demurrer and the defendant, O'Brien, appealed.

Paul W. Kear, W. L. Parker and R. R. Williams for plaintiffs.

Clinton K. Hughes and George H. Wright for defendant, Arthur O'Brien.

BROGDEN, J. The defendant filed an answer to the original complaint and thereby waived defects appearing upon the face of the complaint. *Lanier v. Pullman,* 180 N. C., 406, 105 S. E., 21; *Little v. Little, ante,* p. 1. Compressing the rather meandering allegations of the complaint and amended complaint, it appears that the plaintiffs, as owners of indebtedness secured by a deed of trust upon an apartment house, pray for a foreclosure of the deed of trust; and as it is alleged that the property has been fraudulently conveyed by means of void judicial proceedings, it is further prayed that such proceedings be set aside together with the conveyance by the commissioner appointed in said proceeding, and further, that the proceeds of the sale be applied to the payment of the $57,500 note endorsed by the defendant, O'Brien, after deducting all taxes due upon the property. The main relief sought is the foreclosure of the deed of trust and the cancellation of the tax foreclosure proceeding whereby the defendant, O'Brien, acquired title to the property and to set aside the conveyance made to him. As the complaint and amended complaint are interpreted, the court perceives no fatal misjoinder, certainly in the light of decisions, disclosing a trend of liberality in the construction of complaints as against demurrers. The principles of law involved in the case of *England v. Garner,* 86 N. C., 366, are strikingly similar to those appearing upon the present record. See, also, *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465; *Carswell v. Talley,* 192 N. C., 37, 133 S. E., 181; *Bank v. Mosely,* 202 N. C., 836, 162 S. E., 923.

Affirmed.

JOHN COLVIN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 September, 1933.)

Master and Servant G a—Railroad employee held not acting within scope of employment at time of injury, and nonsuit was proper.

Plaintiff's evidence tended to show that after the close of his day's work as section hand on defendant's railroad, he voluntarily got on a hand car with the rest of the crew and his foreman upon the invitation of the foreman, in order to go to the store for groceries for the accommodation of one of the crew, and that plaintiff was injured in an accident occurring on the way to the store: *Held,* plaintiff was not acting within the scope of his employment at the time of the injury, and defendant's motion as of nonsuit should have been allowed, plaintiff being *sui juris,* and if transportation back to the section house where the hand car was kept was a part of his employment plaintiff could have waited until the car had returned from the trip to the store.

APPEAL by plaintiffs from *Parker, J.,* at June Term, 1933, of EDGECOMBE. Affirmed.

This was an action for actionable negligence brought by plaintiff against defendant alleging damage. The defendant denied negligence. It also set up the plea that plaintiff and defendant were engaged in interstate commerce and pleaded contributory negligence and assumption of risk.

The evidence was to the effect that plaintiff was 29 years of age and had been in the employ of defendant for about 12 years. He was a section-hand. He was seriously and permanently injured on 12 March, 1932. He generally started to work at 7:30 and quit about 4:30. He was injured about 4:32 in the afternoon, after "the close of the day's work."

The plaintiff testified, in part, as follows: "I was on the hand car, which was backing back toward Tarboro, and on the hand car with me was Mr. Askew, Nathaniel Leggett, E. C. Hayes and Jesse Parker, all of whom were in the employ of said railroad company. Jesse Parker was in charge of the crew which operated the hand car at that time, but Mr. Askew was my superior officer, from whom I received instructions in the performance of my duties. The hand car was motor driven with the seats set on the sides thereof so we could sit on the seats and swing our feet on the outside. The hand car had one end closed but the back end was not closed up. The planks on each side of the car on which we sat were about eight inches in width and about a foot or foot and a half in height from the floor of the car. I was sitting on the seat of the car with my feet hanging on the outside as I usually do, so that if anything like a wreck happened I would have a chance to jump off. I did not have any instructions from my superior as to how to ride, but I had been riding this way ever since I had been in the employ of the Coast Line. A line bar is a piece of iron about eight feet in length and about 1½ inches in diameter, with one end sharp pointed and the other end round and is used for the purpose of jacking up the track. I use these line bars in my work and on this occasion the line bars were lying on the floor of the hand car where we always place them. I was sitting on the seat of the car with my feet hanging outside, the line bars lying on the floor of the car, the car backing, when one of the bars slipped out of the car, one end of same hitting the wood cross tie, the other end hitting me in the rectum."

On cross-examination: "The hand car was kept at night in the section house, which is about two miles from the railroad station. When I stopped work the afternoon of the injury I was between the section house and the station. Mr. Askew asked us all who wanted to go to the store to get some groceries but I didn't want to go. Mr. Askew told us to load up and get on the car and we did as he told us. *All this was at the close of the day's work.* At that time I was living at the section house at McNair's crossing. The place where we had been working was between McNair's crossing and the place where my injury occurred. I had been working on this section nine years, and had used the same kind of car for nine years. When the car was backed there were three line bars on it. Nathaniel used one, Mr. Hayes or Mr. Jesse toted one and I toted the line for them. I did not work with any of these bars."

V. E. Fountain and George M. Fountain for plaintiff.
Spruill & Spruill and Gilliam & Bond for defendant.

CLARKSON, J. At the close of plaintiff's evidence defendant made motion as in case of nonsuit. C. S., 567. The court below sustained the motion, and in this we can see no error. The evidence excluded on the hearing, for which plaintiff excepted and assigned error, we do not think material on this record.

For the accommodation of some of the workmen, to get groceries, as testified to by plaintiff, *at the close of the day's work* the foreman and the section hands all got on the hand car and started towards the store. The hand car backing back to go to the store. To be sure, plaintiff testified "Mr. Askew asked us all who wanted to go to the store to get some groceries, but I didn't want to go." But plaintiff did go. He was *sui juris,* and he went voluntarily. If plaintiff, as a part of his employment, was to be carried back to the section house, where he was living, at the close of the day's work, he could have waited until the hand car returned from the trip to the grocery store.

We think the principle applicable to this case is set forth in *Gardner v. R. R.,* 186 N. C., 64 (66). It is there said: "The foreman was not acting at the time in the scope of his employment. He was not about his master's business, but doing a kindly generous act on his own responsibility. The accident was unfortunate and deplorable, but we cannot charge negligence and duty to these defendants." The judgment is

Affirmed.

J. B. COLT COMPANY v. MRS. LUDIE BARBER AND HOYT BARBER.

(Filed 20 September, 1933.)

1. **Trial F a—Issue submitted held insufficient to enable defendants to present defense to jury, and a new trial is ordered.**

In an action on certain promissory notes executed by defendants, defendants filed answer alleging that the notes were given as a part of the purchase price of merchandise sold by plaintiff, and that the execution of the notes and the contract of sale was procured by the false and fraudulent representations of plaintiff and set up a counterclaim for damages. Plaintiff replied, denying the allegations of the defense and alleging that plaintiff had waived the right to rescind the contract by failure to assert such right within the three years allowed by the contract. Defendants offered evidence in support of their allegations, and tending to show that they had refused to pay the notes within six months from date of sale, and requested the court to submit an issue to the jury as to the alleged false representations. The court refused the request and submitted only one issue to the jury as to whether defendants were indebted to plaintiff: *Held,* the issue submitted was not sufficient to enable defendants to present to the jury their contentions upon which their defense was founded, and defendants are entitled to a new trial.

2. Same—Form and sufficiency of issues in general.

The form and number of issues in a civil action is within the sound discretion of the trial court subject to the restrictions that the issues must be issues of fact and raised by the pleadings, that a verdict upon them will enable the court to render judgment, and that the parties have opportunity to present any view of the law arising out of the evidence.

APPEAL by defendants from *Parker, J.,* at March Term, 1933, of MARTIN. New trial.

The execution of the notes sued on in this action by the defendants was admitted. In their answer, the defendants alleged that the execution of the said notes, and of the contract by virtue of which the said notes were executed, was procured by false and fraudulent representations made to them by the agent of the plaintiffs, with respect to the lighting plant, which the defendants purchased from the plaintiff. Upon further allegations in their answer, the defendants prayed judgment that they recover of the plaintiff damages suffered by them as the result of the said false and fraudulent representations. These allegations were denied in the reply filed by the plaintiff, who further alleged that the right of the defendants to rescind their contract with the plaintiff is barred by the failure of the defendants to assert such right within three years after such right, if any, accrued.

At the trial, the defendants tendered the following issue, and requested the court in apt time to submit the same to the jury:

"Were the execution of the contract and of the notes in question procured by false and fraudulent representations as alleged in the answer?"

The court refused to submit this issue to the jury, and defendants duly excepted to such refusal. The only issue submitted to the jury was as follows:

"In what amount, if any, are the defendants indebted to the plaintiff?"

There was evidence tending to support an affirmative answer to the issue tendered by the defendants and refused by the court; there was also evidence tending to show that within six months after the lighting plant was delivered to them by the plaintiff, the defendants discovered that the representations made to them by the agent of the plaintiff, with respect to said lighting plant, were false and fraudulent, and that defendants thereupon refused to pay the notes sued on in this action, and demanded that plaintiff remove the said lighting plant from their premises.

The court instructed the jury that if they should find the facts to be as all the evidence tended to show, they should answer the issue submitted to them, "$381.50, with interest from the maturity of each of said notes." The defendants excepted to this instruction.

From judgment on the verdict as returned by the jury, that plaintiff recover of the defendants the sum of $381.50, with interest on each of the notes sued on from its maturity, and the costs of the action, the defendants appealed to the Supreme Court.

Jos. W. Bailey for plaintiff.
B. A. Critcher for defendants.

CONNOR, J. The issue tendered by the defendants and refused by the court is raised by the pleadings in this action. An affirmative answer to this issue would be determinative of the controversy between the plaintiff and the defendants, unless as alleged in the reply filed by the plaintiff, defendants have waived their right to rescind the contract by virtue of which the notes sued on in this action were executed by them. The single issue submitted by the court was not sufficient to enable the defendants to present to the court and to the jury the contentions on which their defense to this action is founded. It was therefore error to refuse to submit the issue tendered by the defendants, and for this error, the defendants are entitled to a new trial. See *Gaskins v. Mitchell,* 194 N. C., 275, 139 S. E., 435; *Brown v. Ruffin,* 189 N. C., 262, 126 S. E., 613; *Owens v. Phelps,* 95 N. C., 286.

The form and number of the issues in the trial of a civil action are left to the sound discretion of the judge, subject to the following restrictions: (1) That only issues of fact raised by the pleadings should be submitted; (2) that they be such that a verdict upon them will enable the court to render a judgment; and (3) that the parties shall have the opportunity to present any view of the law arising out of the evidence. All the issues of fact raised by the pleadings, and only such issues, should be submitted, and whether there shall be one or more, and in what particular form, is left to the judge, provided the above conditions are met. It is error to submit the single issue, "How much, if anything, is the plaintiff entitled to recover," if other issues are raised, since this leaves out the controverted facts upon which the right to recover is based. McIntosh N. C. Prac. and Proc., p. 545.

New trial.

GUST SAKELLARIS AND A. PAPPAS, COPARTNERS, DOING BUSINESS AS THE BALTIMORE BILLIARD PARLOR, v. ETHEL C. WYCHE.

(Filed 20 September, 1933.)

Evidence J a—Writing is presumed to contain all provisions of agreement and evidence of prior parol provision is incompetent.

Plaintiff brought action for the breach of an agreement alleged to have been entered into by the parties during their negotiations for a lease of defendant's property, the agreement providing that defendant should not lease any other portion of the property for use in the business in which plaintiff was engaged. The alleged agreement was not included in the written terms of the lease contract. *Held,* in the absence of allegations of fraud or mutual mistake, evidence of the alleged agreement was incompetent as parol evidence in contradiction or variance of a written contract, it being presumed that the parties included in the written contract all provisions by which they intended to be bound.

APPEAL by plaintiffs from *Alley, J.,* at June Term, 1933, of BUNCOMBE. Affirmed.

This is an action to recover damages brought by plaintiffs against defendant, for breach of contract. The pleadings and evidence were to the effect that defendant owned a certain building situated within approximately one hundred feet of the public square in Asheville, N. C. The building was divided into three store rooms of equal size and dimension, the center store room being occupied and used as the Union Bus Terminal of Asheville, and in addition there was conducted therein a restaurant, cigar and fruit stand, the other two store rooms in said building being vacant.

One of the plaintiffs, Gust Sakellaris, and defendant entered into a written lease for one of the vacant store rooms and basement, on 25 October, 1930, for the term of five years—said lease was duly recorded. The plaintiffs, at considerable expense, opened the place up as a billiard parlor. They operated this business for sometime, and about 1 October, 1932, the agent of defendant rented the other vacant store room to William, Peter and James Lamprinokas, who opened up a billiard parlor business, and plaintiffs' business thereafter declined on this account. That in negotiating the lease with defendant's agent, he agreed not to rent any other part of the building for a billiard parlor. This covenant or agreement was left out of the lease that was signed by defendant Ethel C. Wyche and plaintiff Gust Sakellaris.

John Y. Jordan, Jr., for plaintiffs.
Cathey & Cathey for defendant.

CLARKSON, J. At the close of all the evidence the defendant made motion for judgment as in case of nonsuit. C. S., 567. The court below sustained this motion and the plaintiffs excepted, assigned error and appealed to the Supreme Court. We can see no error in the ruling of the court below. We have read the record and able briefs of the litigants carefully.

We think the well settled principle set forth in the case of *Ray v. Blackwell,* 94 N. C., 10 (12), is determinative of this controversy: "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound. 1 Greenleaf Ev., sec. 76; *Etheridge v. Palin,* 72 N. C., 213."

If there was a covenant or agreement, as contended by plaintiffs, at the time the lease was signed, it should have been included in the written lease.

In the *Ray case, supra,* at p. 13, it is said: "We do not intend to say, that if the excluded portion of the full parol agreement for renting not contained in the writing, has been left out through fraud or *mutual mistake or accident,* there is not an equitable power residing in the court for its reformation, so that it shall effectuate the common understanding, when the pleadings are framed in such a way as to admit the defense."

It may be noted that the record shows that the lease was made and executed by Gust Sakellaris and Ethel C. Wyche. The action is brought by Gust Sakellaris and A. Pappas, copartners doing business as the Baltimore Billiard Parlor. The judgment below is

Affirmed.

STATE v. ELIZABETH BALDWIN AND FLOYBELL MULL.

(Filed 20 September, 1933.)

1. **Justices of the Peace E a—Appeal from conviction of simple assault must be taken to recorder's court under P. L. 1919, ch. 277 as amended.**

   The right of appeal to the Superior Court from conviction in a justice's court of a misdemeanor within the justice's jurisdiction, C. S., 4647, has been modified by the statutes establishing and expanding the uniform system of recorders' courts, Public Laws of 1919, chap. 277; 1923, chap.

216; 1924, chap. 85; 1931, chap. 233, and under the general provisions of Public Laws of 1919, chap. 277, sec. 54½, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the Superior Court in the counties affected by the act.

2. **Statutes A d—**

Statutes relating to the same subject-matter should be harmonized if possible by any fair and reasonable construction, and where a general and special statute are apparently incompatible the special statute may be considered as an exception to the general statute, and sustained upon this theory.

APPEAL by defendants from *McElroy, J.,* at July Term, 1933, of BUNCOMBE. Affirmed.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

Don C. Young and W. W. Candler for defendants.

ADAMS, J. The defendants were tried in Buncombe County before a justice of the peace on separate warrants charging them with a simple assault. They were adjudged to be guilty, and from the judgment pronounced they appealed to the Superior Court. By consent the cases were there heard together and in each case the appeal was dismissed. From this judgment the defendants appealed to the Supreme Court.

The asserted right of appeal is referred to C. S., 4647, which provides that the accused may appeal from the sentence of a justice of the peace to the Superior Court where the trial shall be anew and without prejudice on account of the former proceeding. This statute has been in effect since 1868. In 1919 the General Assembly authorized the establishment of a uniform system of recorders' courts for municipalities and counties, and subsequently enacted additional legislation for the purpose of expanding the system and making it more efficient. Public Laws, 1919, chap. 277; 1923, chap. 216; 1924, chap. 85; 1931, chap. 233. One of the objects was to relieve the congested dockets of the Superior Court. Accordingly, the Legislature enacted this statute: "In all cases where there is an appeal from a justice of the peace, such appeal shall be first heard in the recorder's court, in like manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the recorder's court." Public Laws, 1919, chap. 277, sec. 54½. This section as enacted was one of many general provisions applicable to the several courts provided by the act. The last clause has reference to the jurisdiction exercised by the statutory courts in all criminal matters arising in the county which are given to justices of the peace. Public Laws, 1923, chap. 216, sec. 13, subsec. 4.

A settled rule of construction requires that all statutes relating to the same subject shall be compared and harmonized if this end can be attained by any fair and reasonable interpretation, and that if two statutes are apparently incompatible, one general in its terms and the other special and expressive of a restricted application, the latter may be considered in the nature of an exception and sustained upon this theory. *Alexander v. Lowrance,* 182 N. C., 642; *S. v. Fink,* 179 N. C., 712; *Commissioners v. Aldermen,* 158 N. C., 191.

Upon the principle stated the appeal should have been taken to the General County Court. Judgment

Affirmed.

STATE v. WARREN PIKE, FLOYD PIKE AND LOYD PIKE.

(Filed 20 September, 1933.)

Criminal Law L b—

The clerk is without authority to allow defendant's application for appeal *in forma pauperis* in a criminal case where the statutory affidavit fails to aver that the application is made in good faith, or defendant's second application, intended to correct the deficiency in the first, is made more than five months after the adjournment of the term.

APPEAL by defendants from *Alley, J.,* at February Term, 1933, of BUNCOMBE.

Criminal prosecution tried on indictment charging the defendants with conspiracy to rob.

The case was tried at the February Term, 1933, Buncombe Superior Court, which resulted in conviction and judgment of twelve months on the roads against each of the defendants. Notice of appeal given in open court. Time allowed for preparing statement of case on appeal. Appeal bond fixed at $100.00.

Thereafter, on 7 March, 1933, the clerk of the Superior Court, on certificate of counsel and affidavit, which failed to contain averment that the "application is in good faith," entered an order purporting to allow the defendants to appeal *in forma pauperis.*

More than five months later, 18 August, 1933, the defendants undertook to cure the defect in their affidavit of insolvency by filing new application for permission to appeal without giving security for costs. This application was likewise granted.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

George F. Meadows for defendants.

Stacy, C. J. Both orders of the clerk, purporting to allow the defendants to appeal *in forma pauperis,* were improvidently entered: The first for want of sufficient affidavit to support it (*S. v. Martin,* 172 N. C., 977, 90 S. E., 502); the second for want of authority to allow it at the time. *Powell v. Moore,* 204 N. C., 654; *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The Court is without jurisdiction to entertain the appeal. *Powell v. Moore, supra.*

Appeal dismissed.

JANE McPHERSON and Husband, A. B. McPHERSON, v. S. B. WILLIAMS.

(Filed 20 September, 1933.)

Evidence B b—Burden of proof on affirmative defense is on defendant, and erroneous placing of burden entitled plaintiff to new trial.

In an action to recover damages for trespass plaintiff has the burden of proof on the issue, but defendant has the burden of proof on the issue of prescription and adverse user set up by him as a defense, and where the burden of proof on this issue is not properly placed on defendant, a new trial will be awarded, the erroneous placing of the burden of proof on a material matter being reversible error.

Appeal by plaintiffs from *Small, J.,* at March Term, 1933, of Camden.

Civil action to recover damages in the amount of $50.00 for alleged trespass in cleaning out ditch which separates lands of plaintiffs and defendant and embanking the dirt and debris, thus dug up, on plaintiffs' side; and to restrain the defendant from further like trespass in the future.

The court placed the burden of proof on the plaintiffs, which is assigned as error, the defendant claiming the right to clean out said ditch and to embank the dirt and debris on both sides thereof by prescription, or adverse user for more than the requisite number of years.

There was a verdict and judgment for defendant, from which the plaintiffs appeal.

W. I. Halstead for plaintiffs.

R. Clarence Dozier for defendant.

STACY, C. J. It is conceded in appellee's brief that "the burden was upon the defendant to show the easement by prescription, or adverse possession," the defense being an affirmative one. *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381. But in this connection it is asserted that "while in disconnected excerpts, it might appear the burden of proof was improperly placed, yet a careful reading of the entire charge will show the jury could not have been misled." *Bechtel v. Weaver,* 202 N. C., 856, 164 S. E., 338; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32.

We have held in a number of cases that the erroneous placing of the burden of proof in respect to a material matter constitutes reversible error. *Power Co. v. Taylor, supra.*

True, in the beginning, the plaintiffs had the burden of proof on the issue of trespass, but when the defendant undertook to justify his use of the plaintiffs' side of the ditch by prescription, or adverse possession, he then assumed the laboring oar. *Hayes v. Cotton,* 201 N. C., 369, 160 S. E., 453.

New trial.

W. M. SHERRILL v. GRAHAM COUNTY.

(Filed 20 September, 1933.)

1. **Master and Servant B b—**

   A contract of hire at a stipulated hourly wage, without reference to the number of hours the employment was to continue, gives the employee no right of action for damages because he was employed a fewer number of hours than other employees engaged at the same time.

2. **Evidence J a—**

   Parol evidence at variance with the terms of a written contract is incompetent.

APPEAL by plaintiff from *Clement, J.,* at June Term, 1933, of GRAHAM. Affirmed.

T. M. Jenkins and R. L. Phillips for appellant.
Moody & Moody and Morphew & Morphew for appellee.

ADAMS, J. The board of commissioners of Graham County made an order for indexing certain records of the county according to the Cott Indexing System and agreed to employ R. O. Sherrill as general supervisor of the work at the rate of forty cents an hour and J. B. Slaughter and the plaintiff as assistants at the rate of thirty cents. After the work had been done the plaintiff instituted this action to recover damages, alleging that the defendant had failed and refused to keep the plaintiff employed for such time as was allotted to each of the others—that R. O. Sherrill had been engaged in the work 2,361 hours, J. B. Slaughter 1,174 hours, and the plaintiff only 641 hours, for which he had been paid. At the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit. C. S., 567.

The judgment is affirmed. The contract does not impose upon the defendant the necessity of allotting to the employees an equal number of hours for work. Moreover, we find nothing in the record showing a compliance, in reference to the plaintiff's claim, with the County Fiscal Control Act. Public Laws, 1927, chap. 146, sec. 15. The parol evidence offered by the plaintiff was at variance with the written contract and was therefore incompetent. Judgment

Affirmed.

A. L. PENDLETON, TRADING UNDER THE FIRM NAME OF STANDARD DRUG COMPANY, v. J. A. SPENCER ET AL.

(Filed 20 September, 1933.)

1. Evidence D a—

Where an action on a note is resisted by defendant solely on the ground that his name was forged on the note, evidence offered by him relating to consideration for the note is properly excluded as being irrelevant to the issue.

2. Appeal and Error J g—

Where testimony of transactions or communication with a decedent is properly excluded as irrelevant to the issue, its competency or incompetency under C. S., 1795 will not be determined on appeal.

APPEAL by plaintiff from *Cowper, Special Judge,* at May Term, 1933, of PASQUOTANK.

Civil action to recover on a promissory note alleged to have been executed by J. A. Spencer, G. F. Spencer and A. S. Hudgins.

The executors of the estate of A. S. Hudgins, deceased, and G. F. Spencer interposed a plea of *non est factum* and alleged that the signatures purporting to bind them were forgeries.

Judgment by default final was rendered against J. A. Spencer for want of an answer, or defense, by the clerk of the Superior Court on 14 March, 1932.

Later, on the trial, J. A. Spencer was offered as a witness to prove the consideration of the note. This was excluded. Plaintiff excepts.

The jury returned the following verdict:

"1. Was the note sued on signed by the defendant G. F. Spencer as alleged in the complaint? Answer: Yes.

"2. Was the note sued on signed by A. S. Hudgins, now deceased, as alleged in the complaint? Answer: No."

From a judgment on the verdict, plaintiff appeals, assigning error in the exclusion of J. A. Spencer's testimony as to the defendants' executors.

LeRoy & Meekins for plaintiff.

A. P. Godwin and McMullan & McMullan for defendants executors.

STACY, C. J. The testimony of J. A. Spencer was properly excluded as the consideration for the note was not in issue.

Therefore, the applicability or nonapplicability of C. S., 1795, to the proffered testimony is not necessarily presented by the record. Its competency is urged under authority of *Sutton v. Walters,* 118 N. C., 495, 24 S. E., 357. Its incompetency is asserted under authority of *Benedict v. Jones,* 129 N. C., 475, 40 S. E., 223. The point is moot as the testimony was properly excluded on other grounds.

No error.

FEDERAL LAND BANK OF COLUMBIA, A CORPORATION, v. Z. M. JOHNSON AND WIFE, EFFIE G. JOHNSON, L. P. DENNING, EASTERN NEWS PUBLISHING COMPANY, BENSON DRUG COMPANY, INCORPORATED; J. B. FAIRCLOTH, H. E. PERRY, TRUSTEE, AND VIRGINIA-CAROLINA CHEMICAL CORPORATION.

(Filed 20 September, 1933.)

Mortgages C c—Title by estoppel will not prevail against purchaser without notice having prior registry—title acquired through independent source.

S., the owner of lands in fee, mortgaged same to F., and thereafter conveyed the lands to C. by deed in which C. assumed the mortgage debt. C. sold the lands to J. by deed warranting the title against all encumbrances and J. executed a purchase money deed of trust in C.'s favor containing like warranty. The notes secured by this deed of trust were purchased by defendant. The mortgage from S. to F. was foreclosed and the lands bought in by J. at the sale. J. executed a mortgage to plaintiff. Plaintiff seeks to have its mortgage declared a first lien and to have the lands sold by decree. Defendant claims a prior lien by estoppel on the ground that J.'s title acquired at the foreclosure of the F. mortgage was an after-acquired title which inured to his benefit as the holder of the notes executed by J. to C. secured by mortgage warranting the lands free from encumbrances. J. claims no interest in the land under her deed from C. *Held,* plaintiff's mortgage constituted a prior lien and plaintiff was entitled to a decree of foreclosure, since, under our registration laws, prior registry prevails against a title by estoppel except as to purchasers with notice of deeds or claims against their grantor subsequent to their grantor's acquisition of title, and feeding the estoppel does not apply where the grantor afterwards acquires title through an independent source.

CIVIL ACTION, before *Grady, J.,* 8 October, 1932. From JOHNSTON. The findings of fact are as follows:

1. "On 1 January, 1919, J. C. Jones, being the owner in fee of 84.32 acres of land in Johnston County, executed a deed of trust thereon, his wife joining him, to Frederick Frelinghuysen, trustee, for the purpose of securing the payment of $2,500, with interest, payable to the Prudential Life Insurance Company. This deed of trust covers the lands in controversy, the same being a tract of 26.15 acres, a part of the 84.32-acre tract.

"Said deed of trust was filed and recorded in Johnston County on 18 January, 1919, Book 9, p. 134.

2. "On 15 December, 1919, J. C. Jones and wife conveyed their equity of redemption in said 84.32-acre tract of land to the Commercial Land Company, by warranty deed, with the following exceptions: 'Except an encumbrance which is now against said premises in the sum of $3,500, which said Commercial Land Company, Incorporated, has assumed and obligated to pay.' Said deed was filed and recorded on 18 December, 1919, Book 66, page 369, of Johnston County registry. The encumbrances referred to in said exception were the Frelinghuysen deed of trust, and another deed of trust to E. P. Spruill, trustee, securing the sum of $1,000 due to Rocky Mount Savings and Trust Company, dated 1 January, 1919, and recorded in Book 42, page 552, of said registry.

3. "On 16 December, 1919, the Commercial Land Company, by deed with full covenants of warranty and seizin, and against encumbrances, conveyed a part of said lands, containing 26.15 acres to Z. M. Johnson, by deed recorded in Book 94, at page 370, of Johnston County registry; the warranty clause being as follows: 'And the said Commercial Land Company covenants with the said Z. M. Johnson, his heirs and assigns, that it is seized of said premises in fee simple, that the same are free and clear from all encumbrances, and that it will forever warrant and will forever defend the title to the same against the claims of all persons whomsoever.'

4. "On the same date, to wit, 16 December, 1919, Z. M. Johnson and wife, Effie G. Johnson, executed and delivered to Commercial Land Company their three purchase money notes, under seal, each in the sum of $1,063.98, due in one, two and three years from date, and also executed a deed of trust to J. D. Newsome, conveying to him the said 26.15-

acre tract of land as security for said three notes; and in said deed of trust it was covenanted that said lands were free of encumbrances. Said deed of trust appears of record in Book 73, page 58, of Johnston County registry, and was filed and recorded on 2 January, 1920.

5. "Said three notes and deed of trust, referred to in article 4 hereof, were purchased by defendant, L. P. Denning, before maturity, for value, and without any notice of defects therein, other than what the records of Johnston County would disclose; and in January, 1922, said Denning brought suit on said notes and deed of trust in Johnston County Superior Court, against Johnson and wife, and secured judgment against them for the full amount due on said notes, and a decree of foreclosure was entered. This judgment was for $3,191.94, with interest and costs; a commissioner was appointed to sell the land, but said judgment has never been paid or executed. See Judgment Docket No. 12, page 112.

6. "Prior to 19 June, 1922, the Commercial Land Company conveyed 34.21 acres of said 84.32-acre tract to Y. W. Wood by warranty deed, covenanting against encumbrances, leaving 27 acres of said 84.32-acre tract unsold. On 19 June, 1922, Frederick Frelinghuysen, trustee, having been requested to do so by the holders of the notes referred to in article 1 hereof, and after due advertisement, foreclosed said deed of trust, and the entire tract of 84.32 acres was bid in and conveyed to Y. W. Wood and Effie G. Johnson, wife of Z. M. Johnson, but Johnson transferred his bid to his wife, and the deed was made to her by the trustee; see register's office of Johnston County, Book 111, page 499. Said deed was filed for registration 22 June, 1922.

7. "On 13 June, 1922, Z. M. Johnson and wife, Effie G. Johnson borrowed certain moneys from the Farmers Commercial Bank, and secured said loan by mortgage deed on the 84.32-acre tract of land, purchased by them under the Frelinghuysen foreclosure. Said mortgage deed is recorded in Book 115, at page 37, of the register's office of Johnston County; and the money thus borrowed was applied towards the payment to Frelinghuysen for said 84.32-acre tract of land, which included the 26.15-acre tract in controversy. On 13 June, 1922, Y. W. Wood and wife executed to Effie G. Johnson a quit-claim deed for a one-half undivided interest in and to the 26.15-acre tract of land, and Z. M. Johnson and wife quit-claimed to Y. W. Wood a tract of 34.21 acres of said large tract, said deeds being properly recorded in Johnston County. This left of the 84.32-acre tract 27 acres, which belonged to Y. W. Wood and Effie G. Johnson as tenants in common. It is admitted that this 27-acre tract is worth $3,307.50.

8. "On 6 July, 1922, Z. M. Johnson and wife, Effie G. Johnson, borrowed from the plaintiff Land Bank the sum of $3,800, represented by notes under seal, and secured the same by mortgage deed to the plaintiff

on 93.15 acres of land in Johnston County, which 93.15-acre tract embraces and includes the 26.15-acre tract in controversy. Said mortgage appears of record in Book of Mortgages No. 108, page 51, of Johnston County registry. The moneys borrowed from the plaintiff by Johnson and wife were used in paying off and discharging the mortgage debt to the Farmers Commercial Bank, referred to in the 7th finding of fact, in the sum of $1,745.75.

"None of the defendants filed answer to the complaint except defendant Denning; and as to those who have not answered, the plaintiff is entitled to judgment by default final.

"The plaintiff claims to hold a prior lien upon the 26.15-acre tract of land under the Frelinghuysen foreclosure, upon the grounds that Denning, assignee of Commercial Land Company (and who stands in its shoes, so far as this action is concerned), is estopped by the record to claim a prior lien upon said tract of land.

"The plaintiff's mortgage deed carries full covenants of warranty and seizin, and against encumbrances. The legal title to the land was in the trustee, Frelinghuysen. The Commercial Land Company took nothing but an equity of redemption, and at the same time contracted to pay the debt secured by the Frelinghuysen deed of trust. Denning can hold no better title than his grantor. The Commercial Land Company failed and refused to pay off the encumbrances which it had obligated to satisfy; but, in violation of the contract, attempted to convey the lands in question to Z. M. Johnson by warranty deed, containing covenants against encumbrances. It took from Z. M. Johnson and wife a purchase money deed of trust, containing like covenants against encumbrances. Effie G. Johnson purchased the outstanding title which was in Frelinghuysen, trustee.

"The Commercial Land Company had knowledge of the Frelinghuysen deed of trust, and its assignee, Denning, was charged with notice of that fact. The records of the county disclosed the true title to be in Frelinghuysen, trustee."

Upon the foregoing facts the trial judge was of the opinion that the plaintiff "has a first lien upon the 26.15-acre tract of land in controversy, and that the defendant Denning's lien upon said land is secondary only; and it is, therefore, ordered and adjudged that the plaintiff be, and it is hereby permitted, authorized and directed to proceed to foreclose its mortgage deed upon the lands described in the complaint; and it is adjudged that none of the defendants has, or can claim any lien upon the same which is prior to that of the plaintiff."

From judgment so rendered the defendant Denning appealed.

James D. Parker for plaintiff.
Ezra Parker for defendant, Denning.

BROGDEN, J. The deed of trust to Frelinghuysen, trustee, was a first lien upon the whole property. This lien was properly foreclosed. Consequently, the purchaser at such sale, nothing else appearing, acquired a fee-simple title, unaffected by subsequent encumbrances. Hence, as the defendant Denning held no security but a junior lien, his security disappeared, as there is no evidence and no finding that any surplus resulted from the sale.

Denning, however, contends and asserts that Effie Johnson and her husband, Z. M. Johnson, executed purchase money notes to the Commercial Land Company, which said notes are now owned by him and secured by a deed of trust to Newsome, trustee, reciting that the lands were free from encumbrance, and that when Effie Johnson became the purchaser of the property upon the sale under the first lien by Frelinghuysen, trustee, that the title she acquired at such sale inured to the benefit of the trustee in the deed of trust securing the payment of the Denning notes, by way of feeding the estoppel. The legal support for such view is found in many decisions in this State. Quoting from 10 R. C. L., p. 677, this Court in *Bechtel v. Bohannon,* 198 N. C., 730, 153 S. E., 316, said: "A grantor of land with full covenants of warranty is estopped to claim any interest in the granted premises. And where he holds a prior mortgage on the premises, he can assert no rights as mortgagee against his grantee." *Hallyburton v. Slagle,* 132 N. C., 947, 44 S. E., 655; *James v. Griffin,* 192 N. C., 285, 134 S. E., 849.

In the present case, however, it is to be noted that Effie Johnson and Z. M. Johnson, her husband, grantors in the deed of trust securing Denning's notes, claim no interest in the land. Furthermore, the governing principles of law are stated in *Door Co. v. Joyner,* 182 N. C., 518, 109 S. E., 259, as follows: "Whatever may be the weight of judicial decisions on this subject, under general principles, the better considered authorities are agreed that under and by virtue of our registration acts, the prior registry shall prevail as against a title of estoppel except as to a purchaser with notice. And in determining this question of notice, the decisions hold that a purchaser having the prior registry is not affected with constructive notice by reason of deeds or claims arising against his immediate or other grantor prior to the time when such grantor acquired the title, but the deed or instrument first registered after such acquisition shall confer the better right." Indeed, in the *Joyner case, supra,* it was strongly intimated by *Justice Hoke* that the doctrine of title by estoppel cannot prevail against the registration law. Moreover, in *Jackson v. Mills,* 185 N. C., 53, 115 S. E., 881, it was held that the principle of title by estoppel or feeding the estoppel had no application in cases where the grantor afterwards acquired title through an independent source. See Annotation *Martin v. Raleigh State Bank,* 51

A. L. R., 442, *et seq.; Huzzey v. Hefferman,* 9 N. E., 570; *U. S. National Bank v. Miller,* 58 A. L. R., 339, 25 A. L. R., 81.

In the final analysis the plaintiff acquired title through a sale duly made in accordance with the power contained in a first lien upon the land, and the decisions of *Door Co. v. Joyner* and *Jackson v. Mills, supra,* fully support the judgment entered by the trial judge.

Affirmed.

JENKINS HARDWARE COMPANY v. GLOBE INDEMNITY COMPANY.

(Filed 20 September, 1933.)

1. Principal and Surety B b—Determination of whether items furnished contractor on public construction are "material" covered by bond.

In determining whether items furnished a contractor in the construction of a public highway are materials used in the construction for which the surety on the contractor's bond is liable, or tools or equipment of the contractor for which the surety is not liable, the general rule is that such items as are necessary and indispensable to the performance of the contract, which the parties reasonably contemplate will be incorporated into the work or consumed in the performance of the contract and which lose their identity in the finished product are to be regarded as material, and in this case there was evidence that some of the items furnished the contractor, including hatchets, shovels, axes, etc., were constituent parts of the equipment of the contractor, and a directod verdict against the surety on the contractor's bond for such items was error.

2. Same—

Whether items furnished a contractor in the construction of a public highway are material used in the construction, or tools and implements of the contractor is a question for the jury where the evidence is conflicting, and a question of law where the facts are admitted.

3. Same—Where commissary is necessary to performance of contract and is a part of the contract of hire, items therefor are "labor."

Where a contractor in the construction of a public highway is compelled as a matter of necessity to furnish his laborers board and lodging as a part of their compensation, deducting his charges therefor from their wages, items necessary for such commissary are covered by the contractor's bond providing for the surety's liability for labor and materials used in the construction, but under the evidence in this case the surety could not be held liable for items used in the commissary, there being no showing that such commissary was necessary to the performance of the work or that the boarding and lodging of laborers was a part of the contract of hire for which deduction could be made from their wages.

CIVIL ACTION, before *McElroy, J.,* at October Term, 1932, of WILKES.

On or about 6 February, 1922, the State Highway Commission made a contract with Hyde and Baxter for the construction of a portion of the highway system of North Carolina between Wilkesboro and Millers Creek in Wilkes County. The proposed road was 5.97 miles long and was known as State Project No. 782. The contractor gave a surety bond executed by the defendant, Globe Indemnity Company. This bond provides that the contractor shall comply with the terms and conditions of the contract and complete the work according to the terms thereof. It further stipulates that the contractor "shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway, all and every sum or sums of money due him, them or any of them, for all such labor and materials for which a contractor is liable."

On various days from 27 February, 1922, to December, 1922, the contractors purchased from the plaintiff, Hardware Company, various items, such as nails, lanterns, hatchets, axes, axe-handles, shovels, padlocks, hasps, galvanized pipe, hose, mattocks, cross-cut saws, wrecking bars, roofing, hinges, post-hole diggers, locks, wheelbarrows, mattock handles, hammers, water pails, blasting machine, wrenches, lock-pads, dynamite, nipples, unions, valves, engine and cylinder oil, jack, water gauges, washers, lugs, wire, bushings, couplings, railroad spikes, sheet iron, rope, steam whistle, scoops, screws, pliers, pipe cutters, pencils, paint, bolts, dishes, chains, cots, mattresses, pillows, bed springs, skillets, frying pans, alarm clock, forks, coffee pots, wash pans, teaspoons, towels, pitchers, wall lamps, dippers, butcher knife, and many other items shown on the itemized statement in the record.

The contractor abandoned the project in December, 1922, and thereafter the work was completed by the defendant surety in September, 1923. At the time the surety took charge of the work it also took charge of the equipment of the contractor, and when the work was finished certain parts thereof were sold. There was testimony from a witness for the plaintiff that lanterns usually last for one or two seasons, and that hatchets, axes, picks, shovels, wrecking bars, padlocks and wheelbarrows usually last sometime, depending upon the use. There was testimony that "it is necessary to have fresh stone, sand and cement in the construction of a concrete road. It is necessary to apply water upon the concrete. They have to put a pipe line on the road and keep it watered for fifteen days after it is poured. . . . It is necessary to use pipe in getting water to the road. . . . Shovels, picks, wheelbarrows, lanterns, hatchets, padlocks, mattocks, wrecking bars and post-hole diggers are part of the equipment of an ordinary contractor. A road could not be built under construction without them. You have got to have that equipment." Another witness said: "The company built three houses for storing cement and built some shacks to board the men. They kept boarders and charged them so much for board.

. . . They covered these buildings with tar paper. . . . There was a kitchen at the quarry for the hands. . . . I saw knives, forks, and all kinds of equipment for a kitchen. . . . They had a camp for the hands." Another witness said: "I was in and out of the camp several times after I was foreman. This consisted of anything a kitchen and boarding house would consist of. Several of the hands had their families and lived there. I never was in it, but I suppose they would have beds and cots. I know the employees lived at the camp." The manager of plaintiff testified: "The camp that was established over on the Finley property was operated in connection with project 782 by Hyde and Baxter. They furnished the hands beds and meals. They had a commissary, kitchen and sleeping quarters. This labor they had was mostly colored. There wasn't any colored boarding houses in North Wilkesboro."

There was also evidence that some of the stone quarried by the contractor was sold to other parties.

The trial judge submitted two issues, as follows:

1. "Is the defendant indebted to the plaintiff, and, if so, in what amount?"

2. "Is the plaintiff's cause of action barred by the statute of limitations?"

The trial judge charged the jury: "If you believe the evidence and find the facts to be as testified to by the witness and shown by the records introduced in evidence in this case, you will answer the first issue "Yes, $2,972.13." No point is made with reference to the statute of limitations, and that phase of the case is eliminated.

From judgment upon the verdict the defendant, Surety Company, appealed.

T. C. Bowie, J. H. Whicker, and Trivette & Holshouser for plaintiff.
Jones & Brown for defendant, Surety Company.

BROGDEN, J. What are materials within the purview of a road contractor's bond of the type disclosed by the present record?

This Court has heretofore determined that certain specified articles constitute material within the purview of a road contract. These include lumber used for construction of a rock crusher, dump forms, etc., groceries for workmen where a commissary is necessary, feed for teams, blasting powder and drills "used up in scaffolds and forms for concrete construction," gasoline and lubricating oil. *Aderholt v. Condon,* 189 N. C., 748, 128 S. E., 337; *Plyler v. Elliott,* 191 N. C., 54, 131 S. E., 306; *Overman v. Casualty Co.,* 193 N. C., 86, 136 S. E., 250; *Grocery Co. v. Ross,* 194 N. C., 109, 138 S. E., 537. Moreover, it has been held that the rental of a ditching machine, wages of State convicts, electric power to operate a rock crusher, rentals of steam shovel and boiler for operating drills are deemed to be labor for such construction. *Sheflow v. Pierce,* 176 N. C., 91, 97 S. E., 167; *State Prison v. Bonding Co.,* 192 N. C., 391, 135 S. E., 125; *Wiseman v. Lacy,* 193 N. C., 751, 138 S. E., 121.

This Court has also definitely declared that plant facilities, instrumentalities or those articles usually classified as equipment, tools and implements of a contractor are neither labor nor material. A comprehensive definition of material is found in *Fulp v. Power Co.,* 157 N. C., 154, 72 S. E., 869. The court held that material "is something that is consumed in the use, as coal, for instance, or labor performed, . . . or is such material as goes into and makes part of the realty or the product in such a way as to be indistinguishable from the mass, as timber put into a building or cotton that is manufactured, etc.; but where the subject-matter for which the debt is incurred keeps its identity, as an engine, even though built into the wall, this section does not apply, because the party had his remedy by retaining title or taking a mortgage on the property sold." Obviously the foregoing refers to the lien statute, but no sound reason is apparent which would give a different definition to "materials" when used in a lien statute or when used in a contract relating to public improvement.

One of the latest utterances upon the subject comes from the Court of West Virginia in the case of *Rhodes v. Riley,* 169 S. E., 525: The Court said: "It is generally held that the surety of a contractor on a public work is not liable for the price of anything in the contractor's regular equipment. A contractor is expected to have such equipment as would ordinarily be used in the performance of his contract. The law was not intended to permit a contractor to go into a bonded job with a run-down outfit and have it rebuilt at the expense of his sureties. . . . The regular equipment is furnished the contractor upon his own credit presumably, and not upon the implied credit of the public." This Court in *Cornelius v. Lampton,* 189 N. C., 714, 128 S. E., 334, declared: "We would say that the rock crusher and cable cars were instrumentalities and not included in the contract." The Supreme Court of Iowa in *Surety Co. v. Des Moines,* 131 N. W., 870, has declared that lanterns, sledges, chisels, axes, bolts, washers, etc., are included in the working equipment of a contractor, and that the purchase of such articles imposes no liability upon the surety. The Missouri Court construed the question in *State, Ex Rel. Hernleben v. Detroit Fidelity & Surety Co.,* 21 S. W. (2d), 494, and declared that "plows, graders and machinery generally used in the performance of the contract remained the property of the owner whose duty it is to keep them in repair and in workable condition." And in *Kansas City v. Yeomans,* 112 S. E., 225, it was held that rope, picks, pickhandles, chains, buckets, spades, shovels, track spikes, rubber boots, hatchets, hose coupling, and wire rope are such as constitute a part of the contractor's plant or his tools and implements with which to do the work. See, also, *Union Indemnity Co. v. State,* 118 Southern, 148; *Gary Hay & Grain Co. v. Fidelity Deposit Co.,* 255 Pac., 722; *Fidelity & Deposit Co. of Md. v. Bailey-Spencer Hardware Co.,* 133 S. E., 799.

The boundary line between articles deemed to be materials and articles deemed to constitute the tools, implements, instrumentalities and equipment of a contractor, lies deep in fog. In some states statutes are more comprehensive and inclusive than in others. Contracts and bonds in many cases contain variable wording. Consequently there is no chopped line in this field of decisions.

While in a large measure the solution of cases of this type depends upon given facts and circumstances, there are certain definite principles which aid in determining whether given articles are to be classified as materials or tools, implements or equipment. The decisions in this State seem to proceed upon the theory that material consists of such articles as (1) are necessary and indispensable to the performance of the contract; (2) which the parties must reasonably contemplate will be incorporated into the work or be consumed in the performance of the contract; and (3) which lose their identity in the finished product, so as to be indistinguishable from the mass.

Applying the principle deduced from our decisions, it is apparent that some of the articles involved in the present suit are not materials. There was evidence that pipe, shovels, picks, wheelbarrows, lanterns, hatchets, shovels, padlocks, axes, mattocks, etc., were constituent parts of the equipment of the contractor, and hence to be classified as tools and implements. There was also testimony that many of the articles mentioned, were not used up in the work or consumed in the performance of the contract, but were actually moved away and perhaps sold to third parties when the project was completed. In other words, if given articles are of such nature or type that they must necessarily be consumed in prosecuting the work and thus lose their identity in the finished product, then such articles must be classified as materials, otherwise as a part of the instrumentalities, tools, implements and equipment of the contractor. Therefore, the trial judge was in error in holding as a matter of law that all of the items described in the pleadings and evidence constituted materials for which the surety would be liable. It is the function of the jury upon conflicting evidence to determine whether such articles are materials or tools, implements or equipment. Of course, upon admitted facts, the question is one of law.

The articles involved in the operation of the commissary or boarding house for employees stand upon a somewhat different footing. Manifestly, if a contractor, as a matter of necessity, was compelled to furnish board and lodging for his workmen as a part of their compensation, deducting the price of such board and lodging from wages paid, then the principle announced in *Brogan v. National Surety Co.,* 246 U. S., p. 257, 62 L. Ed., 703, would apply, and the surety would be liable therefor. But there is no evidence in this case that board and lodging were necessary and indispensable, or a part of the contract of hiring, or based upon any contract or agreement that the contractor should deduct charges therefor from the wages of the worker. This principle was fully discussed and applied in *Grocery Co. v. Ross,* 194 N. C., 109. Consequently, all items for dishes, roofing, beds, bedding, mattresses, etc., involved in the operation of the commissary impose no liability upon the surety, upon the facts disclosed at the trial.

Reversed.

LUDWIG LAUERHASS v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CENTRAL BANK AND TRUST COMPANY, ASHEVILLE, N. C.

(Filed 20 September, 1933.)

Banks and Banking H e—Judgment that plaintiff was entitled to preference for bank's mismanagement of trust estate is upheld.

Evidence in this case is held sufficient to support the findings of fact by the referee that defendant bank, in dealing with itself, bought certain collateral for plaintiff's trust estate at a price in excess of its market value, and charged and received certain unlawful commissions in transactions with the estate, and thus augmented the cash in its vaults, and judgment affirming the referee's findings and declaring plaintiff's entitled to a preference in the bank's assets upon its later insolvency is upheld.

APPEAL by defendant from *Alley, J.,* at April Term, 1933, of BUNCOMBE. Affirmed.

This is an action brought by plaintiff against defendant contending that certain sums of money constitute a preference against the assets of the Central Bank and Trust Company, now in process of liquidation by Gurney P. Hood, Commissioner of Banks, for the State of North Carolina. By consent the matter was referred to Judge J. P. Kitchin, referee.

Among the findings of fact of the referee, is the following:

"(17) That on the transactions herein set forth the trustee bank charged the account of the plaintiff with commissions for the year 1926-27, $387.64; for the year 1927-28, $216.50; for the year 1928-29,

$317.70; for the year 1929-30, to the day of the closing of the bank, $554.20, which commissions were added to the debit side of the income account of the plaintiff. That on 2 April, 1927, the reasonable market value of the Robinson notes was $2,070.60, and in the sale of the said notes to his account, the Central Bank and Trust Company profited in the amount of $5,642.73; that on 24 June, 1930, and 12 July, 1930, the reasonable market value of the fractional certificates hereinabove referred to were respectively $5,400 and $3,480, and that the trustee, Central Bank and Trust Company, in selling said certificates to the account of the plaintiff, profited in the amount of $3,600 and $2,320; that the profits above referred to were paid into the Central Bank and Trust Company in cash and the cash on hand in the said bank and the assets of said bank were augmented in these amounts.

"(18) That the Central Bank and Trust Company, through its officers and agents, wrongfully and fraudulently appropriated the property of the plaintiff and knowingly and fraudulently permitted the trust funds to be unlawfully diverted from the trust estate and thereby became trustee *ex maleficio,* and has failed to account to the trust estate for the same, to wit: an unlawful profit of $5,642.73 on 2 April, 1927, in the transaction involving the sale of the Robinson note to the trust estate, and $3,600 and $2,320 respectively on the sale of said fractional certificates in the mortgage pool.

"(19) That the Central Bank and Trust Company unlawfully, wrongfully and fraudulently charged commissions to the income account of the *cestui que trust,* involving the wrongful appropriation of the trust estate, amounting to $1,476.04, to which the said Central Bank and Trust Company are not entitled, because of the wrongful appropriation and wrongful dealings with itself, in relation to the trust estate.

"(20) That at all times during the period of the transactions involved in the controversy, the cash on hand in the Central Bank and Trust Company was in excess of the amount claimed by the plaintiff in this proceeding and that upon the closing of the said Central Bank and Trust Company this cash passed into hands of the defendant, Gurney P. Hood, Commissioner of Banks.

"(21) That the plaintiff duly filed with the Commissioner of Banks, due proof of his claim and the same was rejected by the said Commissioner of Banks; that this suit was instituted within the time provided by statute for the same."

Conclusions of law: "Upon the foregoing findings of fact the referee is of the opinion and so holds as a matter of law:

"(1) That the plaintiff is entitled to judgment against the defendant for the sum of $11,562.73, by reason of the wrongful profits taken in dealing with itself in relation to the trust estate.

"(2) That the plaintiff is entitled to judgment against the defendant for the sum of $1,476.04, for commissions wrongfully charged and taken in relation to the trust estate, subject to a credit in the sum of $726.29, the amount of the overdraft shown on the books.

"(3) That the above two items constitute a preference in favor of the plaintiff over the depositors and general creditors of the Central Bank and Trust Company, in any distribution or apportionment of the assets of said bank.

"(4) That the plaintiff is entitled to have returned to him the bond which he was required to deposit to indemnify the bank for the releasing of the security. If the bond cannot be returned or has been liquidated then the plaintiff be paid its value in cash, as of the date of said transaction."

Numerous exceptions were duly made to the report of the referee by defendant. The court below rendered the following judgment, in part:

"It is, therefore, ordered, adjudged and decreed that the said report of J. P. Kitchin, referee, be confirmed as to the findings of fact in each and every respect, and be confirmed as to the findings and adjudications of law in each and every respect, as appears in the said report filed in the Superior Court of Buncombe County, State of North Carolina, on 15 March, A.D. 1933; and

"It is further ordered, adjudged and decreed that the plaintiff recover of the defendant, Gurney P. Hood, Commissioner of Banks, *ex rel.* Central Bank and Trust Company, of Asheville, North Carolina, the sum of eleven thousand, five hundred, sixty-two and 73/100 dollars ($11,562.73), together with the further sum of one thousand, four hundred seventy-six and 04/100 dollars ($1,476.04), the latter sum to be subject to a credit in the sum of seven hundred, twenty-six and 29/100 dollars ($726.29); that both of said amounts to which the plaintiff is entitled be and constitute a preference in favor of the plaintiff over the depositors and general creditors of the said Central Bank and Trust Company in any distribution or apportionments of the assets of said bank, and that the plaintiff share in each and every respect in any and all assets of the said Central Bank and Trust Company, as having priority over general creditors and depositors, and be paid *in pari passu* with any and all other persons entitled to priority.

"It is further ordered, adjudged and decreed that the defendant return to the plaintiff the Universal Mortgage Company bond referred to in the complaint, said bond being retained by the defendant to secure the payment of an alleged overdraft in plaintiff's account, which overdraft is hereby declared fully paid and satisfied."

In the statement of case on appeal, is the following: "The defendant hereby waives all of its objections and exceptions to the findings of fact from the said J. P. Kitchin, referee, except that portion of findings of fact No. 17 reading as follows: 'That on 24 June, 1930, and 12 July, 1930, the reasonable market value of the fractional certificates hereinabove referred to were respectively $5,400 and $3,480, and that the trustee, Central Bank and Trust Company, in selling said certificates to the account of the plaintiff, profited in the amount of $3,600 and $2,320; that the profits above referred to (so far as profits on the sale of the fractional certificates of investment are concerned), were paid into the Central Bank and Trust Company in cash and the cash on hand in said bank and the assets of said bank were augmented in these amounts.' Defendant admits that if the Central Bank and Trust Company profited at all there is evidence in the record which would justify the amount of profits as set forth in the foregoing quotation from finding of fact No. 17. Its only contention being that there is absolutely no evidence in the record warranting a finding of fact to the effect that the Central Bank and Trust Company was a recipient of whatever profit, if any, was made in the alleged transactions."

William J. Cocke, Jr., for plaintiff.
Johnson, Smathers and Rollins for defendant.

PER CURIAM. The defendant contends that the questions involved are: "(1) Is the plaintiff entitled to recover of the defendant as a preferred claim against the assets of the Central Bank and Trust Company the sum of $11,562.73, the same representing the difference between the face amount of certain collateral purchased by the bank for the plaintiff's trust estate and the actual market value of said collateral, the market value being arrived at by opinion evidence as to the value of certain real estate and other notes, stock and bonds securing the collateral? (2) Is there evidence in the record supporting the finding of fact to the effect that the Central Bank and Trust Company was the recipient of whatever profit was realized in the 'Mortgage Pool Transaction.'" Both of the questions must be answered in the affirmative.

It is conceded by defendant: "That it is a well established principle of law that findings of fact by a referee, supported by competent evidence and affirmed by a Superior Court on appeal, are conclusive on the Supreme Court."

We think the evidence, though circumstantial and some opinion evidence, is sufficient to sustain the findings of fact. We do not think it necessary to set same forth. We think the cause is governed by *Flack v. Hood, Comr.*, 204 N. C., 337. For the reasons given, the judgment of the court below is

Affirmed.

FRANCES H. ZACHERY v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 20 September, 1933.)

Banks and Banking H e—Judgment that bank hold and pay out deposit according to court's orders held to constitute it deposit for specific purpose.

Plaintiff entered suit by publication against her nonresident husband for reasonable subsistence and counsel fees and attached money belonging to her husband on deposit in defendant bank in the name of the executrix of the estate of the husband's father. The bank and the executrix were made parties to the action. Judgment was entered in the wife's favor and ordering the bank to hold the deposit and pay it out from time to time as ordered by the court for the subsistence of the wife and her minor children. The bank later became insolvent. *Held,* the judgment changed the deposit from a general deposit to a deposit for a specific purpose, entitling the wife to a preferred claim against the bank's assets, the deposit being no longer subject to check by the executrix after the rendition of the judgment.

APPEAL by defendant from *Alley, J.,* at June Term, 1933, of BUNCOMBE. Affirmed.

This is an action to have plaintiff's claim against the Central Bank and Trust Company of Asheville, N. C., adjudged a preferred claim upon the assets of said Bank and Trust Company, which are now in the possession of the defendant, Commissioner of Banks, for liquidation because of the insolvency of the said Central Bank and Trust Company.

The plaintiff, Frances H. Zachery, is the wife of Robert Y. Zachery, Jr., who abandoned the plaintiff and their two minor children some time prior to 1 May, 1927. After his abandonment of her, the plaintiff instituted an action in the Superior Court of Buncombe County against her said husband to have a reasonable subsistence and counsel fees allotted and paid or secured to be paid to her from the estate or earnings of her said husband, who had become a nonresident of the State of North Carolina. Summons in said action was served on the said Robert Y. Zachery, Jr., by publication as authorized by statute. An attachment was levied in said action on a sum of money then on deposit with the Central Bank and Trust Company in the name of Ethel Lee Murray, executrix of Robert Y. Zachery, Sr., deceased, the father of the said Robert Y. Zachery, Jr. The said sum of money was the property of the said Robert Y. Zachery, Jr., and amounted to about $7,000.

At May Term, 1927, of the Superior Court of Buncombe County, a judgment was rendered in said action in which the defendant therein, the said Robert Y. Zachery, Jr., was ordered to pay to the plaintiff therein, Frances H. Zachery, certain sums of money for the subsistence of herself and her minor children. It was further ordered in said judgment that the Central Bank and Trust Company hold the sum of money then on deposit with the said Bank and Trust Company, in the name of Ethel Lee Murray, executrix, and from time to time, as ordered by the court, to pay out of said deposit sums of money to the plaintiff for the subsistence of herself and her minor children. Both Ethel Lee Murray, executrix, and the Central Bank and Trust Company were parties to said action. After the rendition of said judgment and until its insolvency on 19 November, 1930, the Central Bank and Trust Company in compliance with the orders of the court paid to the plaintiff various sums of money, leaving the balance due on said deposit on 19 November, 1930, $1,992.12. At said date, the Central Bank and Trust Company had in its possession the sum of $36,000, in money, and other assets, all of which came into the possession of the defendant, Commissioner of Banks, for liquidation.

On the foregoing facts found by the court, without objection, it was ordered, considered and adjudged that plaintiff's claim against the Central Bank and Trust Company, for the sum of $1,992.12, with interest from 19 November, 1930, is a preferred claim upon the assets of said Bank and Trust Company, and, together with the costs of this action, should be paid as such by the defendant, Commissioner of Banks, out of said assets which are now in his possession.

The defendant excepted to the judgment and appealed therefrom to the Supreme Court.

J. Y. Jordan, Jr., for plaintiff.
Johnson, Smathers & Rollins for defendant.

PER CURIAM. On 19 November, 1930, when the Central Bank and Trust Company closed its doors and ceased to do business, because of its insolvency, the sum of $1,992.12, then on deposit with the said Bank and Trust Company, pursuant to the judgment of the Superior Court of Buncombe County, in the action entitled, "Frances H. Zachery *v.* Robert Y. Zachery, Jr., and others," was a special deposit, or a deposit for a specific purpose. *Parker v. Trust Co.,* 202 N. C., 230, 162 S. E., 564; *Corp. Com. v. Trust Co.,* 193 N. C., 696, 138 S. E., 22. The fact that prior to the attachment and the judgment in said action, the deposit then in said Bank and Trust Company, in the name of Ethel Lee Murray, executrix, was a general deposit, subject to her check, does not determine the character of said deposit, after the rendition of the judgment, for thereafter the deposit was not subject to the check of Ethel Lee Murray, executrix, but was held by the said Bank and Trust Company subject to the orders of the court, for a specific purpose. At the date of the insolvency of the Central Bank and Trust Company, the said deposit, then amounting to $1,992.12, was impressed with a trust which entitles the plaintiff, the *cestui que trust,* to a preference over the general creditors of said Bank and Trust Company. *Flack v. Hood, Comr.,* 204 N. C., 337, 168 S. E., 520. There is no error in the judgment.

Affirmed.

BOLLIN BAKER v. W. D. P. SHARPE, SR.

(Filed 20 September, 1933.)

Payment B a — Evidence as to instruction for application of funds to debt being conflicting, directed verdict is held erroneous.

Plaintiff was defendant's tenant farmer, defendant advancing money to plaintiff, and the parties sharing the crops equally. The operations for one year resulted in a balance due from plaintiff to defendant in a certain sum. The operations for the next year resulted in a profit and a sum due plaintiff by defendant. There was conflicting evidence whether plaintiff instructed defendant to apply the amount due plaintiff from the second year's operations to the debt due defendant by plaintiff from the first year's operations, defendant claiming that plaintiff had instructed him to apply the surplus to the debt. *Held,* a directed instruction in the plaintiff's favor was erroneous, the evidence as to the direction for the application of the funds being conflicting.

APPEAL by defendant from *Parker, J.,* at February Term, 1933, of WILSON. New trial.

This is an action brought before a justice of the peace, by plaintiff against the defendant, to recover a balance due him on a tenancy agreement for the year 1932. Defendant contended that the sum due plaintiff for 1932 was applied on a balance due him for 1931. Judgment was rendered in the justice of the peace court for plaintiff and against defendant, and defendant appealed to the Superior Court, where the matter was heard *de novo.*

The evidence was to the effect that the plaintiff, appellee, tenant, and the defendant, appellant, landlord, had a tenancy agreement for the years 1930, 1931, and 1932; that said agreement provided for a division of proceeds from the sale of crops on the basis of one-half to the tenant, one-half to the landlord. The landlord, retained all moneys received from the sale of said crops and made monetary advances to the tenant from time to time, said advances being made from the one-half due the tenant. In 1931 the tenant was in arrears by reason of said tenancy in the sum of $146.00. The record discloses that "it is admitted by the defendant and plaintiff that the plaintiff was to have one-half of the crop raised upon the lands during the year 1932 as his part of the crop. The crops were sold by the defendant; after the defendant had deducted from the proceeds of the sale the plaintiff's one-half interest in the crop, there remained the sum of $146.00 out of the plaintiff's one-half share in the crop after the plaintiff had paid for all of the advances for the year 1932."

The defendant landlord credited the amount due the tenant plaintiff, $146.00, on his past due indebtedness. The court below charged the jury as follows: "Gentlemen of the jury, there is one issue being submitted to you in this case, which reads as follows: 'In what amount is the defendant indebted to the plaintiff?' If you find the facts to be as all the evidence tends to show and by its greater weight you will answer the issue, 'In what amount is the defendant indebted to the plaintiff?' in the sum of $146.00. I charge you, gentlemen, as a matter of law, if you find the facts to be as all the evidence tends to show and by its greater weight you will answer the issue, $146.00." The jury answered the issue $146.00. Judgment was rendered on the verdict. The defendant excepted, assigned error to the charge of the court below, and appealed to the Supreme Court.

George W. Tomlinson and Charles M. Griffin for plaintiff.
Sharpe & Grimes for defendant.

PER CURIAM. The plaintiff testified, in part: "Asked for settlement but Sheriff Sharpe would not give me one. I asked him for $146.00. He would not give it to me. Said I owed it to him on back account. I had never said anything about paying his back account." On cross-examination: "Q. What was said to you, if anything, about paying the account of 1931? There wasn't anything said about it. I never mentioned it. He never mentioned it to me. Did not say anything about it. . . . Q. Did you specify on which account it was to be applied? Yes, I think I notified him. Told him I wanted it put on this last gone year. Told him along about the first tobacco I sold sometime in September. That was the only time I said anything to him about it. I didn't say anything to him about it until I got through paying this year's, last year's, expenses."

The defendant testified, in part: "I said 'What do you want done with it?' He says, 'I want so much money and pay the other on my account.' The first time I had notice that there was no settlement was when I got the summons. Baker never said anything about applying the money on any particular account."

The principle of law is thus stated in *Stone v. Rich,* 160 N. C., 161 (163-4): "There is no rule in the law better settled than the one in regard to the application of payments: (1) A debtor owing two or more debts to the same creditor and making a payment, may, at the time, direct its application to any one of the debts. The right is lost if the particular application is not directed at the time of the payment. (2) If the debtor fails to make the application at the time of the payment, the right to apply it belongs to the creditor. (3) If neither debtor nor creditor makes it, the law will apply it to the unsecured debt or the one for which the creditor's security is most precarious, or, as sometimes expressed, according to its own view of the intrinsic justice and equity of the case," citing numerous authorities. *Supply Co. v. Plumbing Co.,* 195 N. C., 629.

We think the exception and assignment of error made to the charge of the court below by defendant, must be sustained. We think that there was conflicting testimony as to the application of the money, and it was a question for the jury to determine. For the reasons given, there must be a

New trial.

ALMYRA LEATH TURNER v. W. W. TURNER.

(Filed 20 September, 1933.)

Divorce F d—Procedure to enforce judgment for reasonable subsistence is by motion in the cause and not by independent action.

Plaintiff sued her husband for reasonable subsistence under C. S., 1667, and the parties entered into a consent judgment, approved by the court, providing for the payment to the wife of a certain sum monthly and making such sums a lien upon the husband's real estate. The husband failed to make payments in accordance with the judgment and the wife brought a separate action alleging abandonment. *Held,* the husband's demurrer to the complaint in the second action was properly sustained. C. S., 511, the wife being remitted to the prior judgment.

APPEAL by plaintiff from *Alley, J.,* at June Term, 1933, of BUNCOMBE. Affirmed.

The plaintiff and defendant are man and wife and were married 22 April, 1924. The plaintiff brings this action under C. S., 1667, and after setting forth the grounds in detail, prays "That the court enter a decree requiring the defendant to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of the plaintiff herein as a reasonable subsistence."

The complaint alleges, in part: "That, as hereinbefore alleged, on or about .... January, 1931, the plaintiff herein instituted an action in the Superior Court of Buncombe County for the purpose of requiring the defendant herein to provide her with necessary subsistence according to his means and condition in life, and that at the August Term, 1931, of the Superior Court of Buncombe County, a consent judgment was entered signed by plaintiff and defendant and their respective attorneys, whereby the defendant herein agreed to pay 'the sum of seventy-five ($75.00), per month as a reasonable allowance and maintenance' for plaintiff, and that pursuant to said judgment the defendant made said payments until 1 February, 1933, since which date, the defendant has wrongfully neglected, failed and refused to make further payments, and that by reason thereof the plaintiff herein has been without reasonable maintenance and support and has been compelled to live with her brother in the city of Asheville who was considerate enough of her welfare to permit her to live in his home, and that such wrongful failure and refusal on the part of the defendant amounts in law to an abandonment by the defendant of the plaintiff herein, as contemplated by section 1447 (this section is erroneously stated—the court) of the Consolidated Statutes of North Carolina, and that the defendant, on or about 1 February, 1933, without fault on the part of plaintiff, in truth and in fact, abandoned plaintiff, and failed and neglected to provide her with reasonable subsistence."

The consent judgment of plaintiff and defendant, at August Term, 1931, before Judge Stack, referred to in the complaint and a part of the record, in part, is as follows:

"This cause coming on to be heard before his Honor, A. M. Stack, for trial before a jury, and after the empaneling of the jury, the court having suggested to the plaintiff and the defendant and their attorneys, that they endeavor to compromise and settle this suit out of court, and upon the suggestion of the court, the plaintiff agreed to accept and the defendant agreed to pay the sum of seventy-five dollars ($75.00) per month as a reasonable allowance and maintenance, under the provisions of the act, upon which this suit is based; said payments to be made as follows:

Beginning 15 August, 1931, the sum of $37.50, and the sum of $37.50 on the first and 15th of each succeeding month; said amounts to be paid into the office of the clerk of the Superior Court of Buncombe County.

. . .

It is further ordered by the court that the foregoing amounts shall be and become a specific lien upon any and all real estate owned by the defendant at this time.

It is further ordered and adjudged by the court that the costs of this action shall be paid by defendant. A. M. Stack, Judge Presiding. We consent: (signed) Almyra L. Turner, plaintiff; W. W. Turner, defendant; J. C. Joyner, Zeb Curtis, attorneys for plaintiff; Lee & Lee, attorneys for defendant."

The defendant demurred to the complaint. The following judgment was rendered in the court below:

"This cause coming on to be heard, and being heard before his Honor, Felix E. Alley, judge holding the courts of the Nineteenth Judicial District, at the regular June Term, 1933, of the Superior Court of Buncombe County:

And it appearing to the court, the defendant above named filed a demurrer to the complaint filed in behalf of the plaintiff above named, and it further appearing that said complaint is defective in that it shows on its face that the said plaintiff is without the capacity to sue;

It is therefore, upon motion of Lee & Lee, attorneys for the defendant, considered, ordered and adjudged, that the defendant's demurrer be and the same is hereby sustained, this action dismissed, and the costs of this action be taxed against the plaintiff, by the clerk.

This 28 June, 1933. FELIX E. ALLEY, *Judge Presiding.*"

To the signing of the foregoing judgment the plaintiff excepted, assigned error and appealed to the Supreme Court.

J. C. Joyner and Zeb F. Curtis for plaintiff.
Lee & Lee for defendant.

PER CURIAM. The only question involved in this appeal is whether or not the court below was in error in sustaining defendant's demurrer. We think not.

C. S., 511: "The defendant may demur to the complaint when it appears upon the face thereof, either that: (2) the plaintiff has not legal capacity to sue; . . . or (6) the complaint does not state facts sufficient to constitute a cause of action." The rights of plaintiff are remitted to the judgment before mentioned, which plaintiff and defendant heretofore entered into before Judge Stack. She was *sui juris* and no mistake or fraud alleged.

The law in this cause has been settled by this Court in *Lentz v. Lentz,* 193 N. C., 742; *S. c.,* 194 N. C., 673; *Brown v. Brown, ante,* 64. The judgment of the court below is

Affirmed.

TOWN OF TARBORO v. C. B. WEST, M. T. ATKINS, OSCAR BOWDEN, NOBEL L. CLAY AND OTHERS.

(Filed 20 September, 1933.)

Landlord and Tenant H b—Sureties on bond to secure rent held not liable for rent for renewal period under facts of this case.

The sureties on a bond to secure the payment of rent in accordance with the terms of a lease, may not be held liable for rent for a period subsequent to the expiration of the lease where the lessee occupies the premises for such period under a separate agreement with the lessor, and not by exercising the option for renewal in accordance with the terms of the lease.

APPEAL by plaintiff from *Daniels, J.,* at April Term, 1933, of EDGECOMBE. No error.

This is an action to recover of the defendants the sum of $912.45, with interest, the amount due to the plaintiff as rents for property leased by the plaintiff to the defendant, C. B. West.

At the date of the lease, which is in writing, the defendant, C. B. West, as principal, and the defendants, M. T. Atkins, Oscar Bowden and Nobel L. Clay, as sureties, executed a bond in the sum of five thousand dollars, payable to the plaintiff, and conditioned for the payment to the plaintiff by the defendant, C. B. West, as lessee, of the rents which should accrue under said lease, or under a renewal thereof, if the lease should be renewed in accordance with its provisions, which are as follows:

"However, it is further stipulated and agreed that the said party of the second part is to have the option and the election of renewing this lease from the term hereinafter provided for, for an additional period of two years, provided, however, said party of the second part gives written notice of his election to renew, which said written notice must be given at least sixty days prior to 31 May, 1929."

The original term of said lease expired on 31 May, 1929. The defendant, C. B. West, did not give notice in writing to the plaintiff at least sixty days prior to said date of his election to renew said lease for an additional term of two years. On 27 April, 1929, he appeared before a called meeting of the board of commissioners of the plaintiff, and requested that the date for the exercise by him of his election to renew said lease be extended three months. This request was granted. On 12 August, 1929, at the request of the said defendant, C. B. West, the lease was renewed for a term of nine months from 1 August, 1929, with the privilege of a further renewal for a period of two years, from and after the expiration of said nine months. The defendant, C. B. West, remained in possession of the property described in the lease until 9 October, 1929, when he abandoned said property.

There is now due the plaintiff as rents for the term which expired on 31 May, 1929, the sum of $209.63, and for the term which expired on 19 October, 1929, the sum of $702.82.

Judgment by default was rendered against the defendant, C. B. West, for the sum of $912.45, with interest and costs. The summons in the action was not served on the defendant, Nobel C. Clay. After the execution of the bond filed with the plaintiff, the defendant, Henry Vann, agreed in writing to indemnify the sureties on said bond against loss by reason of the execution of said bond.

The only issue submitted to the jury at the trial of the action was as follows:

"In what amount, if any, are the defendants, M. T. Atkins, Oscar Bowden and Nobel L. Clay, as sureties on the bond referred to in the complaint, and their assignee, Henry Vann, indebted to the plaintiff?"

The court instructed the jury that if they believed the evidence, and found the facts to be as all the evidence tended to show, they should answer this issue, $209.65, with interest from 31 May, 1929. The plaintiff excepted to this instruction.

The jury answered the issue, $209.63, with interest from 31 May, 1929.

From judgment on the verdict that plaintiff recover of the defendants, M. T. Atkins, Oscar Bowden and Henry Vann the sum of $209.63, with interest from 31 May, 1929, and the costs of the action, the plaintiff appealed to the Supreme Court.

George M. Fountain for plaintiff.
Bryant & Jones for defendants.

PER CURIAM. The defendants, M. T. Atkins and Oscar Bowden, admit their liability as sureties on the bond filed with the plaintiff by the defendant, C. B. West, for the sum due plaintiff as rents for the term which expired on 31 May, 1929, to wit, $209.63; they deny their liability for the sum due as rents which accrued after said date, to wit, $702.82.

The lease was not renewed by the defendant, C. B. West, in accordance with its provisions. For this reason, neither the defendants nor their assignee, Henry Vann, are liable for the rents which accrued after the expiration of the lease. There was no error in the instruction of the court to the jury. The judgment is affirmed.

No error.

E. A. HOLLAND AND WIFE, ABBIE HOLLAND; W. L. HORN AND WIFE, ELIZABETH HORN; W. L. HORN, MABEL C. FISHER, CITIZENS BANK AND TRUST COMPANY, ANDREWS BUILDING AND LOAN ASSOCIATION, D. H. TILLETT, TRUSTEE (ORIGINAL PLAINTIFFS); AND HOME MORTGAGE COMPANY, JEFFERSON E. OWEN, SUBSTITUTED TRUSTEE; AND S. M. HOLLAND AND WIFE, ELIZA HOLLAND, v. H. L. DULIN AND T. J. HILL, TRUSTEE.

(Filed 20 September, 1933.)

Bills and Notes C a—Re-assignment of note after maturity held novation, and assignee could not maintain position of holder in due course.

The makers of purchase money notes executed a duly registered deed of trust to A. as security, and later conveyed the lands to A. in full payment. A. transferred the notes in due course as collateral for a debt due a company. A. thereafter borrowed money from B. a member of the company, and paid the debt to the company, and assigned the mortgage note to B. after maturity for the borrowed money. *Held*, B. could not maintain the position of a holder in due course of the mortgage note and was not entitled to foreclose as against the lienors and grantees of A. who took the lands without notice, B. having been assigned the note after maturity, and the payment of the debt to the company, and the assignment of the mortgage note to B. constituting a novation as far as the rights of A.'s lienors and grantees were concerned.

APPEAL by defendants from *Clement, J.*, and a jury, at June Term, 1933, of CHEROKEE. No error.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did W. B. Fisher and wife, Leila Fisher, receive and take title to those two tracts of land described in paragraph 4 of the complaint on or about 5 December, 1923, from S. M. Holland and wife Eliza Holland, in full payment and satisfaction of the two series of notes and the two deeds of trust totaling $2,800, the said deeds of trust being recorded in Book No. 74, at pages 152 and 154, respectively, of Cherokee County registry, and did the parties to this transaction agree and intend to extinguish and cancel the indebtedness and the deeds of trust representing the indebtedness of $2,800 and as executed from S. M. Holland and wife to W. B. Fisher and wife? Answer: Yes.

2. Is the defendant H. L. Dulin the holder of the Holland notes in due course, as alleged in the answer? Answer: No."

Harkins, Van Winkle & Walton and Gray & Christopher for plaintiffs.

H. A. Tapp, Edmund B. Norvell and D. Witherspoon for defendants.

PER CURIAM. We think the principal question involved is as follows: Where makers of purchase money notes to A. for land executed duly registered deed of trust to secure same, and later convey the land to A. and wife, in full payment of the notes, can B., who took an assignment of the notes from A., after maturity, maintain the position of a holder in due course and foreclose the deed of trust as against lienors and grantees of A. and wife? We think not under the facts and circumstances of this case.

We think the plaintiffs' evidence, upon motion of nonsuit, C. S., 567, sufficient—also evidence tending to show lack of actual knowledge on the part of plaintiffs, who were purchasers of the land. The peremptory instruction by the court below that there was no evidence that the defendant Dulin was the holder of the Holland notes given to Fisher in due course was correct. To be sure Fisher had transferred the notes in due course as collateral to secure an indebtedness he owed to Anderson-Dulin-Varnell Company. Fisher, after the maturity of these notes, paid the indebtedness due by him to Anderson-Dulin-Varnell Company, who held these notes as collateral. They were extinguished so far as plaintiffs, purchasers of the land, were concerned. The transaction between Fisher and defendant Dulin was a new one, constituting a novation. All the evidence was to the effect that plaintiffs, who were purchasers of the land, had no actual knowledge of the pledge of these notes to Dulin, which took place after maturity, and after the indebtedness to Anderson-Dulin-Varnell Company was paid.

We have read the record and the able briefs of counsel, but in the trial and judgment of the court below, we find

No error.

N. B. MARRINER, GUARDIAN OF H. W. MIZZELLE, A LUNATIC, v. H. W. MIZZELLE, A LUNATIC, APPEARING BY HIS GUARDIAN AD LITEM, W. D. PRUDEN, AND OTHERS.

(Filed 20 September, 1933.)

Parties B b: Guardian and Ward H a—Surety on guardian's bond held proper party and motion for its joinder was addressed to court's discretion.

The guardian of a lunatic brought action to have certain funds lost on account of the insolvency of his bank of deposit declared a credit to the lunatic's estate, alleging that the loss of the funds was not occasioned by negligence. Defendants answered denying this allegation, and moved that the surety on the guardian's bond be made a party. *Held*, the answer failed to allege a breach of the bond and the surety was a proper party at most, and the motion for its joinder was addressed to the discretion of the court, and the court's action in refusing the motion is not reviewable.

APPEAL by W. D. Pruden, guardian *ad litem* and others, from *Small, J.*, at Chambers, in Elizabeth City, N. C., on 18 February, 1933. From CHOWAN. Dismissed.

This proceeding was begun by petition filed by the plaintiff with the clerk of the Superior Court of Chowan County, and was transferred by said clerk to the civil issue docket of said court for the trial of issues raised by the pleadings.

On the facts alleged in his petition, the plaintiff prayed for an order allowing him as guardian credit for certain sums of money which he had deposited as guardian in certain banks, and which had been lost by reason of the subsequent insolvency of said banks. He alleged that said loss was not due to any negligence on his part. This allegation was denied by the defendants, who were made parties to the proceeding on motion of the plaintiff.

The proceeding was heard on the motion of the defendants that the surety on the guardian bond of the plaintiff be made a party to the proceeding. The motion was denied. The defendants excepted and appealed to the Supreme Court.

Ward & Grimes for plaintiff.
W. D. Pruden and J. A. Pritchett for defendants.

PER CURIAM. It does not appear from the pleadings in this proceeding that the surety on the bond filed by plaintiff as guardian is a necessary party to this proceeding. It is not alleged in the answer filed by the defendants that there has been a breach of the bond. At most the surety is only a proper party. The motion of the defendants that the surety be made a party was addressed to the discretion of the court. McIntosh N. C. Practice & Procedure, page 185. For this reason, the refusal of the court to allow the motion is not reviewable by this Court. The appeal by the defendants is

Dismissed.

ADDIE CORY v. J. B. CORY.

(Filed 20 September, 1933.)

Automobiles C a—Driver turning to right and leaving sufficient room may assume that approaching car will turn to right and avoid collision.

Evidence tending to show that defendant drove his car on the right side of the road and left sufficient room for an approaching car to pass is insufficient to take the case to the jury in an action by a guest in defendant's car for an injury sustained in a collision of the cars, based on defendant's alleged negligence in failing to turn off the highway and drive on the shoulders of the road, the defendant having the right to assume that the driver of the approaching car would turn to his right and avoid the collision, and there being no evidence that the situation was such that defendant was negligent in failing to drive on the shoulders of the road.

APPEAL by plaintiff from *Clement, J.,* at March Term, 1933, of GRAHAM. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff while she was riding in an automobile driven by the defendant, as his guest.

The injuries suffered by the plaintiff were caused by a head-on collision between the automobile in which she was riding and another automobile.

The allegations in the complaint that the collision between the two automobiles was caused by the negligence of the defendant in failing to drive his automobile off the highway, and thus avoiding the collision, were denied in the answer.

At the close of the evidence for the plaintiff, the defendant moved for judgment dismissing the action as upon nonsuit, on the ground that there was no evidence tending to sustain the cause of action alleged in the complaint. The motion was allowed, and plaintiff excepted.

From judgment dismissing the action, the plaintiff appealed to the Supreme Court.

Moody & Moody for plaintiff.
Johnston & Horner for defendant.

PER CURIAM. All the evidence offered by the plaintiff at the trial of this action showed that when he observed the approaching automobile, the defendant drove his automobile, in which the plaintiff was riding as his guest, on the right side of the highway, leaving ample space for the driver of the approaching automobile to pass in safety. There was no evidence tending to show a situation in which defendant was negligent in failing to drive his automobile off the highway onto the shoulder. He had a right to assume that the driver of the approaching automobile would drive to his right, and thus pass him without a collision. *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 340. The judgment dismissing the action is

Affirmed.

J. E. WINSLOW COMPANY, INCORPORATED, v. R. J. CUTLER.

(Filed 20 September, 1933.)

Claim and Delivery C c—Motion for sale of property pending trial held addressed to discretion of court.

Plaintiff took possession of certain mules from defendant by claim and delivery and the execution of the statutory bond, and moved that the mules be sold and the proceeds of sale held pending the determination of the issue of title between the parties. *Held,* even if the court had the power to order the sale of the mules over defendant's objection, the motion was addressed to the discretion of the court, and the court's refusal of the motion is not reviewable.

APPEAL by plaintiff from *Barnhill, J.*, at May Term, 1933, of BEAUFORT. Affirmed.

This is an action to recover from the defendant possession of two mules which had been sold by the plaintiff to the defendant, and which had been conveyed by the defendant to the plaintiff by a chattel mortgage to secure a note for the balance due on the purchase price for said mules. In his answer, the defendant denied that plaintiff was entitled to recover the possession of the said mules.

At the date of the commencement of the action, the mules described in the complaint were taken from the possession of the defendant by the sheriff of Beaufort County, under a writ of claim and delivery, and delivered to the plaintiff, who had filed in the action the undertaking required by statute.

While the action was pending for trial, the plaintiff moved for an order that the mules be sold by a commissioner appointed by the court, and that the proceeds of the sale be held awaiting the trial of the issues raised by the pleadings. This motion was denied, and plaintiff excepted and appealed to the Supreme Court.

Ward & Grimes for plaintiff.
W. A. Thompson for defendant.

PER CURIAM. There was no error in the refusal of the judge to allow plaintiff's motion.

Even if the judge had the power to allow the motion, over the objection of defendant, its exercise was within the discretion of the judge and for that reason is not subject to review by this Court on plaintiff's appeal. The appeal must be

Dismissed.

C. E. HOLDER AND C. H. HOLDER v. HOME MORTGAGE COMPANY, V. S. BRYANT, SUBSTITUTE TRUSTEE, AND FRED MOORE.

(Filed 20 September, 1933.)

Injunctions D b—

An injunction will ordinarily be continued to the hearing where serious controversy exists, and dissolution may cause great injury to plaintiff and continuance result in no harm to defendant.

APPEAL by plaintiffs from *Clement, J.*, at June Term, 1933, of CHEROKEE. Reversed.

R. L. Phillips for plaintiff.
W. A. Devin, Jr., and Gray & Christopher for defendants.

PER CURIAM. This is an action brought by plaintiffs against defendants to enjoin defendants from foreclosing a certain deed of trust on a house and lot of plaintiffs' in the town of Murphy, N. C. A restraining order was granted and on the hearing the defendants demurred *ore tenus* to the complaint and amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The court below sustained the demurrer and in this we think there was error. If defendants wanted the complaint made more definite or a bill of particulars, they should, on motion to the court below, have requested same. The complaint we think is sufficient to state a cause of action, though somewhat indefinite.

Injunction generally will be continued, where it will not harm defendant and may cause great injury to plaintiff, if dissolved. *Wentz v. Land Co.,* 193 N. C., 32; *Brinkley v. Norman,* 190 N. C., 851; *Cullins v. State College,* 198 N. C., 337. Temporary restraining order will be continued until hearing, where serious controversy exists, and continuance cannot harm defendant, while dissolving might injure plaintiff. *Brown v. Aydlett,* 193 N. C., 832.

We do not discuss the facts set forth in the pleadings, as the case goes back for a hearing on the merits. The judgment of the court below is

Reversed.

GEORGE P. STREET v. D. S. HILDEBRAND AND HIS WIFE, O. S. HILDEBRAND, AND OTHERS.

(Filed 11 October, 1933.)

1. **Taxation H c—Owners of land are barred by foreclosure of tax certificate in action in which they are served with summons.**

   Where the county has bid in land sold by it for nonpayment of taxes and assigned the certificate to another for value, and the assignee has brought action to foreclose his certificate in which summons has been served on the owners of the land in whose name the lands had been listed, a judgment by default final for the want of an answer will estop the original owners of the land or those claiming under them from claiming title as against the purchaser at the sale of the lands by the commissioner appointed by the court in the foreclosure proceedings. N. C. Code, 1931, sec. 8037.

2. **Same—Mortgagee making appearance within six months from service by publication is not barred by foreclosure of tax sale certificate.**

   Where those claiming a mortgage lien on lands have their mortgage on record before the beginning of proceedings to enforce the tax lien on the lands and have been served by publication in the action to foreclose the tax certificate, in accordance with the provisions of our statute, and within six months from the service by publication they appear and file answers, their mortgage liens are not affected by the sale of the lands by a commissioner appointed by the court in the action to foreclose the tax certificate, and upon establishing their interest in the land, they are entitled to have the judgment and sale of the land declared void, and the deed to the purchaser at the sale set aside upon reimbursing the purchaser for the amount of taxes paid plus interest, penalties and costs. N. C. Code, 1931, sec. 8037.

APPEAL by plaintiff and the defendant, Wiley B. Brown, from *McElroy, J.*, at March Term, 1933, of HENDERSON. Affirmed.

This is an action to foreclose a tax-sale certificate.

The land described in the certificate is located in Hooper's Creek Township, Henderson County, North Carolina. It was listed for taxation on 1 May, 1929, in the name of the defendant, D. S. Hildebrand. The taxes levied on said land for the year 1929 by Henderson County were not paid. Pursuant to statutory provisions, the land was sold by the tax collector of Henderson County on 25 June, 1930, to Henderson County, the last and highest bidder at said sale in the sum of $780.45. On 7 April, 1931, the certificate of sale which was issued to Henderson County by the tax collector was assigned and transferred, for value, by the board of commissioners of Henderson County to the plaintiff, George P. Street. This action was begun by the plaintiff in the Superior Court of Henderson County on 7 April, 1932, as authorized by statute. N. C. Code, 1931, sec. 8037.

The summons in the action was duly served on the defendant, D. S. Hildebrand and his wife, O. S. Hildebrand, by the sheriff of Henderson County on 11 April, 1932.

Pursuant to an order made in the action by the clerk of the Superior Court of Henderson County on motion of the plaintiff, the following notice was posted at the courthouse door in Henderson County and also published in a newspaper published in said county on 20 April, 1932, and once a week thereafter for a total of four successive weeks:

NOTICE OF SERVICE.

To all persons claiming any interest in the subject-matter of this action:

You are notified that on the 7th day of April, 1932, an action entitled as above was commenced in the Superior Court of Henderson County for the purpose of foreclosing the lien of a tax-sale certificate for the 1929 Henderson County taxes (which said certificate is dated 25 June, 1930) upon the lands listed in the name of D. S. Hildebrand for said year, and described as a 165-acre brick-yard tract in Hooper's Creek Township, and being the same land fully described as the "Third

Parcel" in that certain deed of trust recorded in the office of the register of deeds of Henderson County in Book No. 128 at page 625 of Mortgages and Deeds of Trust, reference to which is hereby expressly had for a more particular description of said land and premises, and the same being all the lands owned on 1 May, 1929, by D. S. Hildebrand in Hooper's Creek Township, said county and State.

And you will further take notice that you are required to appear, present, set up and defend your respective interests and claims in and to said property in six months from the date of this notice, or be forever barred and foreclosed of any and all interest in or claims to the property above referred to, or the proceeds of the sale thereof.

This the 19th day of April, 1932.

J. P. FLETCHER, *Clerk Superior Court.*

The defendants, D. S. Hildebrand and his wife, O. S. Hildebrand, failed to file an answer to the complaint within the time required by the summons which was served on them, and on 13 June, 1932, on motion of the plaintiff, judgment by default was rendered in the action against them. It was considered, ordered and adjudged by the court that plaintiff had a lien on the land described in the complaint for the sum of $780.45, with interest and costs, and that said land be sold by a commissioner appointed by the court for that purpose to satisfy said lien. It was further considered, ordered, adjudged and decreed by the court that the defendants, D. S. Hildebrand and his wife, O. S. Hildebrand, and "all other persons claiming by, through or under the said defendants be forever barred and foreclosed of all equity, right and title in and to the said land referred to in the complaint."

Pursuant to said judgment and decree, the land described in the complaint was sold by the commissioner appointed by the court for that purpose on 8 August, 1932. At said sale, Wiley B. Brown was the last and highest bidder for the land in the sum of $1,060.00. The sale was duly reported by the commissioner to the court, and confirmed on 10 September, 1932. Pursuant to the order confirming the sale, the land was conveyed by the commissioner to the purchaser, who had first complied with his bid by paying to the commissioner the amount of his bid in cash. The commissioner thereafter filed with the court his final report showing the payment by him of the amount due to the plaintiff on account of the tax-sale certificate, and of the costs of the action. The balance, to wit, $16.83, was deposited by the commissioner with the clerk of the Superior Court of Henderson County.

Within six months from the date of the first publication of the notice to all persons claiming any interest in the subject-matter of the action, to wit, on 7 October, 1932, C. N. Walker, trustee, and the Wachovia Bank & Trust Company filed an answer to the complaint in this action.

In this answer it is alleged that on 9 January, 1931, the defendants, D. S. Hildebrand and his wife, O. S. Hildebrand, conveyed the land described in the complaint to C. N. Walker, trustee, by deed of trust, to secure an indebtedness to the Wachovia Bank & Trust Company in the sum of $65,000.00, and that said deed of trust was duly recorded in the office of the register of deeds of Henderson County in Book No. 128, at page 625, prior to the commencement of this action. The Wachovia Bank & Trust Company tendered to the plaintiff the sum of $968.37, in full payment of the amount due the plaintiff on the tax-sale certificate described in the complaint, which sum the Wachovia Bank & Trust Company had deposited with the court, contemporaneously with the filing of its answer. These answering defendants prayed that the plaintiff be required to accept the amount tendered by the Wachovia Bank & Trust Company in full payment of the amount due him and that the judgment rendered in the action on 13 June, 1932, and all subsequent proceedings thereunder be set aside and vacated.

The motion of the answering defendants for judgment in accordance with their prayer, together with the reply of Wiley B. Brown, the purchaser at the sale on 8 August, 1932, was heard by the clerk of the Superior Court of Henderson County on 23 November, 1932. On the facts found by the clerk at said hearing, the motion was denied, and the answering defendants appealed to the judge of the Superior Court of Henderson County.

At the hearing of this appeal, at March Term, 1933, of the Superior Court of Henderson County, on the facts found by the judge, it was considered, ordered and adjudged "that C. N. Walker, trustee, holds the legal title to the lands described in the complaint and in the deed of trust executed by the defendants, D. S. Hildebrand and his wife, O. S. Hildebrand, and that the Wachovia Bank & Trust Company holds a lien on said land for the payment of the sum of $65,000.00, with interest thereon, and as the holder of said lien was entitled to redeem said land and property from sale for taxes."

It was further considered, ordered and adjudged "that the judgment, orders and proceedings herein adverse to the claims, interests and estate of the said C. N. Walker, trustee, and the Wachovia Bank & Trust Company be and the same are hereby set aside, revoked and vacated, and said judgment, order of sale, sale, confirmation of sale and deed of E. W. Ewbanks, commissioner, are adjudged to be ineffectual to affect or bar any rights, or interests of the defendants, C. N. Walker, trustee, and the Wachovia Bank & Trust Company in and to said property."

It was further considered, ordered and adjudged "that the taxes, penalties, interest and costs on said property for the year 1929 have been paid by the Wachovia Bank & Trust Company, and that said land is free and discharged of the lien of said taxes for the year 1929."

It was further considered, ordered and adjudged "that the funds deposited with the clerk of this court by the said Wachovia Bank & Trust Company be paid to Wiley B. Brown in reimbursement of the amount of the tax, penalty, interest and costs."

From this judgment, plaintiff and the defendant, Wiley B. Brown, appealed to the Supreme Court.

Ewbanks & Weeks for plaintiff.

Sanford W. Brown and J. W. Haynes for defendant, Wiley B. Brown.

George H. Wright and Bourne, Parker, Bernard & DuBose for defendants, C. N. Walker, trustee, and Wachovia Bank & Trust Company.

CONNOR, J. The judgment in this action rendered on 13 June, 1932, is valid and effective for all purposes as against the defendants, D. S. Hildebrand and his wife, O. S. Hildebrand. The land described in the tax-sale certificate owned by the plaintiff at the commencement of this action was listed for taxation for the year 1929 in the name of the defendant, D. S. Hildebrand. This defendant and his wife, O. S. Hildebrand, were made defendants in the action as required by statute. N. C. Code, 1931, sec. 8037. Summons was duly served on both defendants; they failed to file an answer to the complaint which was duly verified, and filed at the commencement of the action, within the time required by the summons; for this reason, the plaintiff was entitled to judgment by default against these defendants on the cause of action alleged in the complaint. N. C. Code, 1931, sec. 8037(a½). The defendants, D. S. Hildebrand and his wife, O. S. Hildebrand, by virtue of the judgment, are forever barred and foreclosed of all right, title, interest or estate in or to the land described in the complaint. As against these defendants, Wiley B. Brown, the purchaser at the sale made pursuant to the judgment, is now the owner of the said land by virtue of the deed executed to him by the commissioner appointed by the court. He is the owner of the said land in fee simple, free from any and all claims of the defendants, D. S. Hildebrand and his wife, O. S. Hildebrand, or of any person claiming under them who has failed to file an answer to the complaint, within six months from the publication of the notice required by statute. N. C. Code, 1931, sec. 8037. *Guy v. Harmon,* 204 N. C., 226, 167 S. E., 796; *Orange Co. v. Wilson,* 202 N. C., 424, 163 S. E., 113.

The judgment, however, is not valid or effective for any purpose as against persons who had or claimed interests in the land described in the complaint at the date of the commencement of the action, and who, within six months after the publication of the notice to such persons as required by the statute, filed answers to the complaint.

The defendants, C. N. Walker, trustee, and the Wachovia Bank & Trust Company filed an answer to the complaint, within six months after the publication of the notice requiring them to appear, present, set up and defend their respective interests in the land described in the complaint. For this reason, the judgment is not valid or effective as against these answering defendants.

We find no error in the judgment. It is

Affirmed.

JAMES C. CORUM v. R. J. REYNOLDS TOBACCO COMPANY, INC.

(Filed 11 October, 1933.)

1. **Negligence A e—Negligence may be proven by circumstances from which reasonable inference of negligence may be drawn.**

While neither negligence nor proximate cause will be presumed from the fact of injury, and mere conjecture will not support an action for damages, negligence need not be proven directly, but proof of circumstances from which reasonable men could draw divergent conclusions as to negligence is sufficient to overrule defendant's motion of nonsuit.

2. **Food A a—Evidence in this case held sufficient to take case to jury in consumer's action against manufacturer of plug tobacco.**

Evidence tending to show that plaintiff bought from a local retailer plug tobacco manufactured by defendant, and that plaintiff while on his way home from the store, bit the tobacco and was injured by a fish-hook which stuck through his lip, that all of the paper wrapper had not been removed from the tobacco, which had recently come from the store, and that the inside of the plug showed the imprint of the fish-hook, that other foreign substances had been found in the same brand of tobacco manufactured by defendant within two months preceding the injury, and that the foreman in defendant's plant had previously had complaints that other foreign substances had been left in the tobacco, *is held* sufficient to overrule defendant's motion of nonsuit, the evidence being sufficient to prove circumstances from which a reasonable inference of negligence could be drawn without invoking the doctrine of *res ipsa loquitur.*

3. **Same—Plug tobacco held to come within the meaning of the rule of liability of manufacturers to ultimate consumers.**

While plug tobacco is not a food it is an article manufactured for consumption by an ultimate consumer, and is capable of inflicting serious physical injury when foreign and deleterious substances are allowed to become embedded therein, and it comes within the rule that a manufacturer of food or drink is liable for injuries caused the ultimate consumer by reason of foreign or deleterious substances negligently left in the manufactured article.

APPEAL by defendant from *Schenck, J.,* at May Term, 1933, of YADKIN.

The defendant manufactures a brand of plug or chewing tobacco known as "Apple Sun-cured." It sold some of this tobacco to J. W. Smitherman, a wholesale merchant in Winston-Salem, who in turn sold it to Norman Brothers at East Bend, in Yadkin County. On 4 June, 1931, the plaintiff bought a plug of it from Norman Brothers and returned to his home, which is about a mile from East Bend. He offered evidence tending to show that at 1:30 o'clock while going back to East Bend he put a part of the plug in his mouth to bite off a chew and "jerked the tobacco," when a fish-hook which was embedded in the plug "stuck on the inner side of his lip and came out on the outside"; that with the fish hook and the tobacco he went to a physician who removed the hook; that after its removal, the plaintiff "prized the tobacco open" and found a mark inside "where the fish-hook had been lying"; that on the end of the hook there was a piece of string about two inches long; that he suffered pain, was given anti-toxin to prevent tetanus, had difficulty in opening and closing his mouth, and complained of stiffness in his jaw and neck.

The defendant introduced witnesses who explained the process of manufacture by the approved methods of modern machinery and offered testimony tending to show that the defendant was not negligent but used due care in the manufacture of its products, and that the plaintiff's injury was not the result of any neglect of duty on its part.

The defendant in apt time moved to dismiss the action as in case of nonsuit; the motion was denied and the defendant excepted.

Two issues were submitted to the jury and answered as follows:

1. Was the injury to the plaintiff, James C. Corum, caused by the negligence of the defendant R. J. Reynolds Tobacco Company, as alleged in the complaint? A. Yes.

2. What amount, if any, is plaintiff, James C. Corum, entitled to recover of the defendant, R. J. Reynolds Tobacco Company? A. $1,200.

Judgment for plaintiff; appeal by defendant. The several exceptions are referred to in the opinion.

Elledge & Wells and W. M. Allen for plaintiff.
Benbow & Hall for defendant.

ADAMS, J. The appellant noted a number of exceptions during the trial but the basal controversy relates to the motion for nonsuit, the defendant contending that the record contains no adequate evidence of negligence which is actionable. We have repeatedly held, in accord with the general principle, that the fact of personal injury is not regarded as proof either of negligence or of proximate cause, and that a mere conjecture will not support an action for damages. *Grimes v. Coach Co.*, 203

N. C., 605; *Rountree v. Fountain, ibid.,* 381. The plaintiff, however, is not required to make out his case by direct proof, but may rely upon circumstances from which a reasonable inference of negligence may be drawn, *Dail v. Taylor,* 151 N. C., 284; *Perry v. Bottling Co.,* 196 N. C., 175, in which event the evidence must be interpreted most favorably for the plaintiff, and if it is of such character that reasonable men may form divergent opinions of its import it is customary to leave the issue to the final award of the jury.

There are many decisions to the effect that one who prepares in bottles or packages foods, medicines, drugs, or beverages and puts them on the market is charged with the duty of exercising due care in the preparation of these commodities and under certain circumstances may be liable in damages to the ultimate consumer. *Broadway v. Grimes,* 204 N. C., 623; *Broom v. Bottling Co.,* 200 N. C., 55; *Harper v. Bullock,* 198 N. C., 448; *Grant v. Bottling Co.,* 176 N. C., 256; *Cashwell v. Bottling Works,* 174 N. C., 324.

In this case the plaintiff adduced evidence tending to show that the defendant is the sole manufacturer of "Apple Sun-cured Tobacco"; that the tobacco in question was of this brand and had the appearance of having recently come from the store; that it was protected by a wrapper; that all the wrapper had not been removed at the time of the injury; that when a part of it was torn away the imprint of a fish-hook and a string which had been embedded in the plug of tobacco was discovered; that some other foreign substance had been found in the same brand of tobacco within two months preceding the injury; and that the foreman of the machine room had previously had complaints that other foreign substances had been left in the manufactured product. *Perry v. Bottling Co., supra.* Without the necessity of invoking the maxim *res ipsa loquitur,* the plaintiff introduced independent evidence which called for a verdict.

Without antagonizing the stated principle, the defendant takes the position that tobacco is not a food or within the category of any of the articles numerated above and is hence beyond the scope of the cited cases. The word "food" has been variously defined by lexicographers as "nutritive material taken into the body for the purpose of growth, repair, or maintenance; that which is eaten or drunk for nourishment; whatever supplies nourishment to organic bodies." It may be conceded for the present purpose that tobacco is not a food; but it does not necessarily follow that the defendant is exempt from liability.

In *Pillars v. R. J. Reynolds Tobacco Company,* 78 So. (Miss.), 365, the plaintiff sued the defendant for damages resulting from the chewing of a piece of Brown Mule tobacco in which a decomposed human toe was concealed. After referring to the general rule and its exceptions together with the contention that the limit has been reached by the courts and that the facts did not warrant an exception in favor of the plaintiff the Court observed: "We know that chewing tobacco is taken into the mouth, that a certain proportion will be absorbed by the mucous membrane of the mouth, and that some, at least, of the juice or pulp will and does find its way into the alimentary canal, there to be digested and ultimately to become a part of the blood. Tobacco may be relatively harmless, but decaying flesh, we are advised, develops poisonous ptomaines, which are certainly dangerous and often fatal. Anything taken into the mouth there to be masticated should be free of those elements which may endanger the life or health of the user. . . . The fact that the courts have at this time made only the exception mentioned to the general rule does not prevent a step forward for the health and life of the public. The principle announced in the cases which recognize the exceptions, in our opinion, apply, with equal force, to this case."

The principle was maintained and applied in the subsequent case of *R. J. Reynolds Tobacco Company v. Loftin,* 99 So. (Miss.), 13, in which it appeared that in a plug of chewing tobacco there was embedded the partially decomposed body of a small snake.

In *Liggett & Myers Tobacco Company v. Rankin,* 54 S. W. (Ky.) 612, it was shown that a worm "about the size of a match with many stingers on it" had been pressed into a plug of tobacco in the process of manufacture, and that when the plaintiff chewed the tobacco the stingers became embedded in his mouth, the inside of which "looked like a man's face with a week's growth of beard." The plaintiff suffered pain, was unable to work, and brought suit for damages. Remarking that chewing tobacco is made to be chewed and that things dangerous to health when taken into the mouth are no less within the rule than things that are taken into the stomach, the Court said: "While tobacco is not a food, it acts upon the nerves and the nerves are no less to be considered than the stomach on which the food acts. The juices from the chewing of tobacco do in fact find their way to the stomach, and poison in chewing tobacco is no less dangerous to health than poison in chewing gum or a liquid taken for its effect on the nerves. Here there was a poisonous worm and the case cannot be distinguished from those where poison was found in other articles manufactured and sold for human consumption. Although chewing tobacco is not a food, it is within the rule which applies to all things manufactured for human consumption which are dangerous to health or life."

Substantially the same principle was enforced in *Foley v. Liggett & Myers Tobacco Co., Inc.,* 241 N. Y. Sup., 233, in which the grievance was personal injury resulting from the use of "Velvet" tobacco which contained the mutilated fragments of a dead mouse. "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger." *McPherson v. Buick Motor Co.,* 217 N. Y., 382.

The defendant has cited *Liggett & Myers Tobacco Co. v. J. J. Cannon,* L. R. A., 1916 A (Tenn.) 940, in which it was held that a manufacturer of chewing tobacco was not liable for injury to a consumer because of the incorporation into the product of a poisonous insect if he had no actual or constructive knowledge of its existence; but some of the decisions heretofore mentioned referred to the opinion in that case and concluded that the distinction therein stated cannot be maintained. Upon the merits of the present case we entertain a similar opinion. A fish-hook embedded and concealed in a plug of tobacco, though not a poison, is no less capable of inflicting serious physical injury. The trial court was correct in denying the motion for nonsuit.

There are other exceptions in the record but none is of sufficient gravity to require a new trial. They raise familiar questions which have often been considered and determined adversely to the contention of the defendant.

No error.

STATE OF NORTH CAROLINA ON THE RELATION OF MABEL FOUNTAIN FINN, ERMA FOUNTAIN ANDERSON, REGINALD FOUNTAIN, AND REGINALD FOUNTAIN, GUARDIAN OF L. H. FOUNTAIN v. JEFFERSON L. FOUNTAIN, JR., AND THEODORE K. FOUNTAIN, EXECUTOR OF J. L. FOUNTAIN, DECEASED, JEFFERSON L. FOUNTAIN, JR., AND THEODORE K. FOUNTAIN, TRUSTEES UNDER THE WILL OF J. L. FOUNTAIN, DECEASED, MARY KING FOUNTAIN, AND RURIK G. GAMMON, ADMINISTRATOR OF THEODORE FOUNTAIN, DECEASED.

(Filed 11 October, 1933.)

1. **Limitation of Actions C a—Guardian's payment of interest on sum due ward after majority does not affect bar of statute as to sureties.**

The liability of a surety on a guardianship bond is dependent upon the guardian's failure to pay damages caused by breach of the bond, and an action is barred as to the sureties in three years from the accrual of a cause of action for breach of the bond, C. S., 441(6), and an action for breach of the bond based upon the guardian's failure to pay the ward the balance of the estate due the ward within six months after the ward attains his majority is barred as to the sureties after three years from the date the guardian should have made payment, C. S., 2188, and the fact that the guardian continued to pay the ward interest on the amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties.

2. **Limitation of Actions B a—Action against guardian for failure to pay balance due ward is barred after six years from final account.**

   An action against a guardian for failure to pay the ward the balance of the estate due the ward after the ward has attained his majority is not barred by the six-year statute of limitations where the guardian has not filed a final account, C. S., 439(2), the statute not applying to such action.

APPEAL by the plaintiffs, Mabel Fountain Finn and Erma Fountain Anderson, from *Daniels, J.,* at April Term, 1933, of EDGECOMBE. Modified and affirmed.

This is an action to recover of the defendants on a guardian bond. The bond is dated 25 February, 1919, and was executed by Theodore Fountain, as guardian of Mabel B. Fountain (now Finn), Erma Fountain Anderson, Reginald Fountain, and L. H. Fountain, each of whom was under the age of twenty-one years at the date of the execution of the bond, and by J. L. Fountain and V. E. Fountain, as sureties. The action was begun on 2 December, 1931.

The guardian, Theodore Fountain, died intestate during the month of August, 1931; the defendant, Rurik G. Gammon, has been duly appointed and has duly qualified as administrator of the said Theodore Fountain, deceased.

The surety, J. L. Fountain, died during the year 1927, leaving a last will and testament which has been duly probated and recorded; the defendants, Jefferson L. Fountain, Jr., and Theodore K. Fountain, are the executors of the said J. L. Fountain, deceased, and are also trustees named in his will. The defendant, Mary King Fountain, is the widow of J. L. Fountain, deceased, and is a devisee and beneficiary named in his will.

The surety, V. E. Fountain, was adjudged a bankrupt in a bankruptcy proceeding instituted in the United States District Court for the Eastern District of North Carolina on 14 December, 1926, and was discharged from liability on the bond sued on in this action by an order and decree of said Court on 3 October, 1927.

At the trial of the action, it was ordered and adjudged by the Court that the plaintiff, Reginald Fountain, recover of the defendants other than V. E. Fountain, in his own behalf, the sum of $3,000.00, and as guardian of L. H. Fountain, the sum of $4,000.00, these being the amounts in which the jury found that said defendants are indebted to the said plaintiffs, respectively. There was no exception to or appeal from said judgment.

It was admitted at the trial that the plaintiff, Mabel Fountain Finn, became of the age of twenty-one years during the year 1924 and that the plaintiff, Erma Fountain Anderson, became of the age of twenty-one years during the year 1921.

The evidence at the trial showed that Theodore Fountain as guardian of Mabel Fountain Finn filed in the office of the clerk of the Superior Court of Edgecombe County on 13 March, 1924, his annual account as such guardian, showing that the sum due by him as her guardian at said date was $3,131.15. This annual account was duly audited and approved by the clerk of the Superior Court. No final or other account was thereafter filed by the said Theodore Fountain as guardian of the plaintiff, Mabel Fountain Finn.

The evidence at the trial also showed that Theodore Fountain as guardian of Erma Fountain Anderson filed in the office of the clerk of the Superior Court of Edgecombe County on 17 August, 1920, his annual account as such guardian, showing that the sum due by him as her guardian at said date was $2,993.99. This annual account was duly audited and approved by the clerk of the Superior Court. No final or other account was thereafter filed by the said Theodore Fountain as guardian of the plaintiff, Erma Fountain Anderson.

There was evidence at the trial tending to show that after the plaintiff, Mabel Fountain Finn, and the plaintiff, Erma Fountain Anderson, each became of the age of twenty-one years, and until the year 1930, Theodore Fountain paid to each of them, annually, the interest on the amount due her by him.

The court was of opinion that upon the facts admitted at the trial, the action was barred by the statute of limitations as to the plaintiff, Mabel Fountain Finn, and also as to the plaintiff, Erma Fountain Anderson, as against both the guardian and the sureties on his official bond, and therefore adjudged that the action be and the same was dismissed as to these plaintiffs.

From the judgment dismissing the action as to them, the plaintiffs, Mabel Fountain Finn and Erma Fountain Anderson appealed to the Supreme Court.

H. H. Philips for plaintiffs.

Ruark & Ruark for defendants, Jefferson L. Fountain and Theodore K. Fountain, executors and trustees of J. L. Fountain, deceased.

CONNOR, J. This is an action to recover on the official bond of a guardian. The court was of opinion that on the facts admitted at the trial the action is barred by the statute of limitations as against both the guardian and the sureties on his bond. In accordance with this opinion, the action was dismissed, and the plaintiffs appealed to this Court. The only assignment of error on the appeal is based upon the exception to the judgment.

The guardian and one of the sureties on his bond had died before the commencement of the action. The other surety, who was made a party defendant after the action was begun, had been adjudged a bankrupt, and had been duly discharged from liability on the bond. The action was prosecuted on behalf of the appealing plaintiffs against the administrator of the deceased guardian, and the executors of the deceased surety. The guardian had failed to pay to either of the plaintiffs the amount due her by him as guardian when she became of the age of twenty-one years, or within six months thereafter. This is the breach of the bond complained of as the cause of action alleged in the complaint.

At the date of the commencement of the action more than three years had elapsed since the plaintiffs, Mabel Fountain Finn, and Erma Fountain Anderson, had become of the age of twenty-one years. As to these plaintiffs, the action is, therefore, barred by the statute of limitations as against the defendants, executors of the deceased surety. C. S., 441(6), *Self v. Shugart,* 135 N. C., 185, 45 S. E., 484; *Anderson v. Fidelity Co.,* 174 N. C., 417, 93 S. E., 948, unless as contended by the plaintiffs, the payment by the guardian of interest on the amount due by him to each of the plaintiffs, each year after she became of the age of twenty-one years until the year 1930, suspended the statute of limitations as to the sureties on his official bond.

The period prescribed by the statute within which an action against the sureties on the official bond of a guardian must be begun is three years after the breach complained of as the cause of action alleged in the complaint. C. S., 441(6). In the instant case, the cause of action alleged in the complaint accrued at the expiration of six months from the date when the plaintiffs, respectively, arrived at the age of twenty-one years. C. S., 2188. The statute of limitations began to run against each of the plaintiffs and in favor of the sureties on the bond at said date, and continued to run for more than three years and six months before the action was begun. The running of the statute as against the plaintiffs and in favor of the sureties was not suspended by the payment of interest by the guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations which began to run against each of his wards, when she became twenty-one years of age. *Barber v. Asher Co.,* 175 N. C., 602, 96 S. E., 43; *Wood v. Barber,* 90 N. C., 76. There was no error in dismissing the action as to the defendants, the executors of the deceased surety. As against them, the action is barred by the statute of limitations.

As against the guardian, the statute of limitations began to run at the expiration of six months from the date when the plaintiffs respectively became of the age of twenty-one years. As the guardian failed to file a final account within six months after his wards became of age, the six-year statute of limitations (C. S., 439(2) has no application to this action. For this reason there was error in the judgment dismissing the action as to the administrator of the deceased guardian on the ground that the action is barred as against the said administrator by the six-year statute of limitations. The judgment as modified in accordance with this opinion is

Affirmed.

LUKE WRIGHT, BY HIS NEXT FRIEND, S. G. WRIGHT, v. SAM NASH.

(Filed 11 October, 1933.)

Replevin G a—Where replevin bond covers costs in court inferior to Superior Court plaintiff successful in suit may recover such cost.

While a replevin bond executed by a defendant in claim and delivery is not required by statute to cover the costs of the action in any court inferior to the Superior Court if the issue should be finally determined in plaintiff's favor, C. S., 836, where the bond is written to cover such costs, and there is no allegation of fraud or mistake entitling the principal or surety on the bond to equitable relief, the plaintiff in the claim and delivery action may enforce the payment of the costs incurred in the recorder's court against the principal and surety on the bond upon a final determination of the case in plaintiff's favor upon appeal.

CLARKSON, J., dissenting.

APPEAL by the surety on the replevin bond filed by the defendant in the above entitled action, from *Small, J.*, at March Term, 1933, of CAMDEN. Affirmed.

This action was begun in the Recorder's Court of Camden County on 15 December, 1930, to recover possession of personal property upon the allegation that plaintiff is the owner and entitled to the possession of said property.

The property described in the affidavit filed by the plaintiff was taken from the possession of the defendant by the sheriff of Camden County under a writ of claim and delivery issued in the action at the date of its commencement. On 22 December, 1930, the defendant filed a replevin bond as authorized by statute, which was executed by J. R. Spencer as surety. The personal property was thereupon delivered by the sheriff to the defendant, who retained possession of the same pending the action.

The bond executed by J. R. Spencer as surety and filed by the defendant in the Recorder's Court of Camden County was conditioned, among other things, that if it should be adjudged by the court in the action that plaintiff was the owner and entitled to the possession of the personal property described therein, and said property should be delivered by the defendant to the plaintiff, the defendant would pay to the plaintiff damages for its detention, and the costs of the action.

At the trial in the Recorder's Court, it was adjudged by the court that plaintiff was the owner and entitled to the possession of the personal property which is the subject-matter of the action, and that plaintiff have and recover of the defendant the possession of said property, and of the defendant and the surety on his replevin bond damages for its detention, and the costs of the action. The defendant paid the costs of the action incurred in the Recorder's Court, and appealed from the judgment of said court to the Superior Court of Camden County.

At the trial of the action in the Superior Court, the issues submitted to the jury were answered in accordance with the contentions of the plaintiff. It was adjudged by the court that plaintiff was the owner and entitled to the possession of the personal property described in the complaint, and that plaintiff have and recover of the defendant the possession of said property and of the defendant and the surety on his replevin bond damages for its detention, and the costs of the action. Neither the defendant nor the surety on his replevin bond excepted to or appealed from said judgment. The costs of the action as taxed by the clerk of the Superior Court was $76.65.

On 30 November, 1931, on motion of the plaintiff, an execution was issued on the judgment against the defendant for the costs of the action. This execution was returned by the sheriff of Camden County unsatisfied.

Thereafter, on motion of the plaintiff an execution was issued on the judgment against J. R. Spencer, surety on the replevin bond filed by the defendant in the Recorder's Court. The said surety moved before the clerk of the Superior Court that said execution be recalled and vacated on the ground that the judgment against him is void. The motion was denied by the clerk, and the surety appealed to the judge of the Superior Court of Camden County.

From the order of the judge, affirming the order of the clerk denying his motion, the surety appealed to the Supreme Court.

LeRoy & Meekins for plaintiff.
W. I. Halstead and R. Clarence Dozier for the surety.

CONNOR, J. The replevin bond executed by J. R. Spencer as surety was filed by the defendant in the Recorder's Court of Camden County, in which court this action was instituted. For that reason, it was not required by statute that the bond should be conditioned for the payment by the defendant of the costs of the action, in the event that it should be adjudged that plaintiff was the owner and entitled to the possession of the personal property which is the subject-matter of the action. C. S., 836. The statute requires that the defendant's undertaking or bond for the replevy of personal property taken from him under a writ of claim and delivery issued in an action for the recovery of the possession of personal property, shall be conditioned for the payment of the costs of the action by the defendant, if it shall be adjudged therein that plaintiff is the owner and entitled to the possession of the property, only where the action was instituted in the Superior Court. Where the action was instituted in the court of a justice of the peace, or in a court inferior to the Superior Court, the defendant is not required by statute to give bond for the payment by him of the costs of the action, if a judgment adverse to him is rendered in the action. However, when, as in the instant case, the bond filed by the defendant in an action instituted in a court other than the Superior Court, is so conditioned, the bond is not for that reason void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are bound according to the terms of the bond, which they executed voluntarily. 9 C. J., 24.

The judgment in this action that plaintiff recover of the defendant and of J. R. Spencer, the surety on his replevin bond, the costs of the action, was not void. *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466. For that reason, there was no error in the refusal of the clerk to allow the motion of the surety that the execution on the judgment against him be recalled and vacated. *Wallace & Sons v. Robinson,* 185 N. C., 530, 117 S. E., 508. The order of the judge must be and is

Affirmed.

Clarkson, J., dissenting: There was no controversy as to the facts of this case. A replevin bond, executed by J. H. Spencer as surety and filed in the Recorder's Court of Camden County, included a condition for the payment by the defendant of the costs of the action, in the event that it should be adjudged that the plaintiff was the owner and entitled to the possession of the personal property, which is the subject-matter of this action. However, the statute (C. S., 836) under which the action was brought in the Recorder's Court specifically provides that "the defendant's undertaking shall include liability for costs . . . only where the undertaking is given in actions instituted in the Superior Court." Does the fact that a replevin bond including liability for costs filed in the Recorder's Court make it a valid bond for costs when the case was heard on appeal in Superior Court? I think not.

The statute under which this action was brought, C. S., 836, reads as follows: "At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and detention, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

"The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the Superior Court."

The principle is laid down as follows: "Sureties will not be bound in excess of the statutory demand, and when the penalty named is greater than that stipulated in the statute the bond will be held only for the statutory requirement." Stearns' Law of Suretyship (3d ed.), 23. It is the rule in North Carolina that the provisions of a statute are presumed to have been written into a bond in suit, and any stipulation incorporated therein at variance with the terms of the statute is void, *Horne-Wilson, Inc., v. Surety Co.,* 202 N. C., 73; *Brick Co. v. Gentry,* 191 N. C., 636; *Electric Co. v. Deposit Co.,* 191 N. C., 653. See *Mfg. Co. v. Blaylock,* 192 N. C., 407; *Supply Co. v. Plumbing Co.,* 195 N. C., 629.

The defendant paid the costs in the action in the Recorder's Court, for which the surety had inadvertently bound himself in the undertaking, and the question as to the validity of the bond of the surety in that court is not now before us. In view of the statute and in the light of our decisions, the bond given in the Recorder's Court must be construed as having been void as to the inclusion of liability for costs, even in that court and certainly if void in its inception, it cannot subsequently in an action on appeal be held to be valid. The surety was not a party to the action on appeal, having received no notice of same, and the bond for costs cannot be said to have been continued in force for that reason.

I think the judgment as to the costs in the Superior Court should be modified.

STATE v. ROBERT BELL.

(Filed 11 October, 1933.)

1. **Homicide B a—**

Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. C. S., 4200.

2. **Criminal Law F d—Court should hear plea of former jeopardy in prosecution for crime including crime for which prisoner was tried.**

Where a defendant has been placed in jeopardy on an indictment charging conspiracy to burglarize a certain home and with burglariously robbing said home, and a judgment of not guilty entered, and thereafter the defendant is placed on trial on an indictment charging conspiracy to commit murder and murder of the occupant of the home, who was killed by one of the conspirators in an attempt to commit the burglary or robbery, and it appears that both the attempted robbery and the murder arose out of the same transaction, and that the death of deceased occurred prior to the first indictment and that in so far as the defendant is concerned the same facts necessary to a conviction on the second indictment would have necessarily convicted him on the first, the defendant's plea of former jeopardy entered in the trial of the second indictment should have been heard by the court, the burden of proof on the plea being upon defendant.

3. **Criminal Law F b—Time from which jeopardy attaches.**

Jeopardy attaches to a defendant when he is placed on trial on a valid indictment before a court of competent jurisdiction after arraignment and plea and after the jury has been empaneled for the trial, and in this case the record, though indefinite, is held to sufficiently show that the defendant had been placed in jeopardy.

4. **Criminal Law F f—**

The burden of proof on a plea of former jeopardy is on defendant.

Appeal by defendant, Robert Bell, from *Clement, J.*, at April Term, 1933, of Macon.

Criminal prosecution tried upon indictment charging the defendants, in one count, with conspiracy to murder George Dryman, and, in a second count, with the murder of the said George Dryman. The defendant, Robert Bell, entered pleas of not guilty and former jeopardy.

The deceased was a farmer, eighty-four years of age, living in Macon County with his three maiden daughters. It was known that he kept a sum of money, which later proved to be about $2,300, in a trunk in his house. The defendants conceived the idea of robbing the old man of his money, so on the night of 23 January, 1933, they first went to the home of Ernest Stamey and there masked themselves. They then got in Robert Bell's car and were driven to a point near the Dryman home. Here, the other defendants left the car with the understanding that

Robert Bell should drive down the Georgia road and wait there for his confederates and pick them up after they had accomplished the robbery.

In attempting to perpetrate the robbery, one of the conspirators struck George Dryman over the head with a board, inflicting injuries from which he died about three weeks later. They did not get the money.

At the April Term, 1933, Macon Superior Court, which was a two-weeks term, it seems that the solicitor sent two bills before the grand jury, each containing two counts.

In the first bill, J. R. Bell, Ernest Stamey, Robert Bell, Louise Stamey, Clyde Woods and Mell Holden were charged (1) with conspiring to burglarize the home of George Dryman, and (2) with burglariously robbing said home.

It is alleged that some of the defendants, including the defendant, Robert Bell, were tried upon this indictment during the first week of the term and that "at the close of the evidence, the solicitor for the State took a judgment of not guilty as to the defendant, Robert Bell." The record is silent as to what the verdict was as to the other defendants then on trial.

In the second bill sent before the grand jury, J. R. Bell, Robert Bell, Ernest Stamey, Clyde Woods and Mell Holden were charged (1) with the conspiracy to murder George Dryman, and (2) with the murder of the said George Dryman.

The record states that Ernest Stamey, Clyde Woods and Robert Bell were tried during the second week of the term upon this bill. J. R. Bell and Mell Holden were not put on trial for the reason that J. R. Bell had not been taken and Mell Holden was dead.

Upon the call of the case, the defendant, Robert Bell, entered a plea of former jeopardy, and offered to show that at the same term of court he had been tried and acquitted on the first bill above mentioned. The court ruled that his plea was not good and excluded the evidence. Exception.

The three defendants then on trial were convicted of murder in the second degree and from the judgment pronounced thereon of "imprisonment in the State's prison of not less than 25 nor more than 30 years," the defendant, Robert Bell, appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

Edwards & Leatherwood for defendant.

STACY, C. J. The case was tried upon the theory that if the defendants conspired to burglarize or to rob the home of George Dryman and a murder were committed by any one of the conspirators in the attempted perpetration of the burglary or robbery, each and all of the defendants would be guilty of the murder. This is a correct proposition of law. *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590. It is provided by C. S., 4200 that a murder "which shall be committed in the perpetration or attempt to perpetrate any . . . robbery, burglary or other felony, shall be deemed to be murder in the first degree."

The evidence discloses that the conspiracy was to rob, and not to murder, George Dryman; that the homicide was committed in the attempted perpetration of the robbery; and the defendant, Robert Bell, offered to show, under his plea of former jeopardy, that he had theretofore been tried and acquitted on the charge of a conspiracy to rob the deceased.

It is clear that the attempted robbery and the homicide grew out of the same transaction, and so far as Robert Bell is concerned, the facts required to convict him on the second indictment would necessarily have convicted him on the first. *S. v. Freeman,* 162 N. C., 594, 77 S. E., 780; *S. v. Hankins,* 136 N. C., 621, 48 S. E., 593; *S. v. Lawson,* 123 N. C., 740, 31 S. E., 667; *S. v. Cross and White,* 101 N. C., 770, 7 S. E., 715; *S. v. Nash,* 86 N. C., 650.

It is true, there is a difference between a conspiracy to burglarize a house with intent to commit robbery therein, and a conspiracy to burglarize it with intent to commit murder (*S. v. Allen,* 186 N. C., 302, 119 S. E., 504), but here the murder was incidental to the attempted robbery, as all the evidence shows, and upon this theory the case has been tried.

There was but one act, one intent and one volition, so far as Robert Bell is concerned. 8 R. C. L., 144. He only furnished the conveyance, and remained a distance from the scene of the crime, nevertheless, he was one of the conspirators. *S. v. Whitehurst,* 202 N. C., 631, 163 S. E., 683. It will be observed the death of the deceased did not intervene between the first and second indictments. 8 R. C. L., 148.

In a case practically on all-fours with the one at bar, *S. v. Mowser,* 92 N. J. L., 474, 106 Atl., 416, 4 A. L. R., 695, the New Jersey Court of Errors and Appeals held that where robbery is by statute made a constituent element of murder in the first degree when death ensues in the perpetration of the robbery, a conviction of robbery will be a bar to a prosecution for a murder arising out of the same transaction:

In discussing the principles determinative of the question presented, the Court said:

"The principle to be extracted from well-considered cases is that by the term, 'same offense,' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment.

Reg. ex rel. Thompson v. Walker, 2 Moody & R., 457; *Reg. v. Stanton,* 5 Cox, C. C., 324.

"When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater.

"To adopt any other view would tend to destroy the efficacy of the doctrine governing second jeopardy which is embedded in our organic law as a safeguard to the liberties of the citizens.

"In discussing this interesting topic, Mr. Bishop, in Vol. 1, 5th ed., paragraph 1057, of his learned treatise on Criminal Law, says: 'But where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes, included, as before mentioned, within a larger, the question arises, whether this will bar an indictment embracing one of the larger. If it will not bar, then the prosecutor may begin with the smallest, where there are several crimes included with one another, and obtain successive convictions ending with the largest; while, if he had begun with the largest, he must there stop, a conclusion repugnant to good sense. Besides, as the larger includes the smaller, it is impossible a defendant should be convicted of the larger without being convicted of the smaller; and thus, if he has been already found guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller offense. Some apparent authority, therefore, English and American, that a jeopardy for the less is no bar to an indictment for the greater, must be regarded as unsound in principle; while the doctrine which holds it to be a bar rests firmly on adjudication also.' "

The point is made that the record is too indefinite to show the result of the first trial. The record is indefinite, but jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case. *S. v. Ellis,* 200 N. C., 77, 156 S. E., 157; 16 C. J. 236-237.

It is also observed the date of the alleged offenses is laid in the indictments as 17 April, 1933, the date on which the term of court convened. The evidence shows that the attempted robbery took place on 23 January, 1933, and the deceased died 12 February following.

The defendant has the burden of proof (*S. v. White,* 146 N. C., 608, 60 S. E., 505) on his plea in bar, and he may not be able to make it good, but the court erred in declining to hear him on his plea of former jeopardy. *S. v. King,* 195 N. C., 621, 143 S. E., 140; *S. v. Ellsworth,* 131 N. C., 773, 42 S. E., 699.

New trial.

SYLVESTER BRANTLEY v. J. S. COLLIE AND R. M. SANFORD, COPARTNERS, DOING BUSINESS UNDER THE NAME OF THE SERVICE WAREHOUSE COMPANY, THE PLANTERS NATIONAL BANK AND TRUST COMPANY, AND P. H. COLLIE.

(Filed 11 October, 1933.)

1. **New Trial C b—**

The trial court has the power to set aside a verdict and order a new trial at any time during the term during which the action was tried. C. S., 591.

2. **Bills and Notes D a—**

The payee of a check may not hold the drawee bank liable thereon until the drawee bank has accepted the check. C. S., 3171.

3. **Contracts F a—Theory that third person for whose benefit contract is made may sue thereon held inapplicable to this case.**

Plaintiff alleged that the defendant bank entered into an agreement with defendant warehouseman whereby the bank agreed to pay all checks issued by the warehouseman in the course of his business for the season in consideration of the warehouseman's execution of a note with an endorser to cover any overdraft in the warehouseman's account, that plaintiff was issued a check by the warehouseman in the course of business, and that the bank refused to pay the check. *Held*, the bank's demurrer to the action was properly sustained. The case of *Gorrell v. Water Supply Co.*, 124 N. C., 328, cited and distinguished.

4. **Appeal and Error J g—**

Where, on appeal, an order sustaining a defendant's demurrer to the complaint is affirmed, such defendant's appeal from an order dismissing its cross-action against another defendant whom it seeks to hold liable only in the event recovery is had against it will also be affirmed.

APPEALS by plaintiff and defendant, the Planters National Bank and Trust Company, from *Parker, J.*, at April Term, 1933, of NASH. Affirmed in both appeals.

This is an action to recover of the defendants the sum of $568.33, the aggregate amount of seven checks, which are payable to the order of the plaintiff, and which were drawn during the month of December, 1931, by the defendants, J. S. Collie and R. M. Sanford, copartners, doing business under the name of the Service Warehouse Company, on the defendant, the Planters National Bank and Trust Company.

The checks were duly presented for payment by the plaintiff to the defendant, the Planters National Bank and Trust Company, which refused to pay the same. The checks had not been accepted by the said defendant. This action was begun on 24 May, 1932.

It is alleged in the complaint that prior to the issuance of the checks described therein, the defendant, the Planters National Bank and Trust Company, had contracted and agreed with the defendants, J. S. Collie and R. M. Sanford, copartners, doing business as the Service Warehouse Company, that it would pay all checks drawn during the tobacco selling season of 1931, by the Service Warehouse Company in connection with the operation of its business during said season; and that the checks described in the complaint were drawn and issued by the Service Warehouse Company in connection with the operation of its business during said season.

It is further alleged in the complaint that the defendants, J. S. Collie and R. M. Sanford, copartners, doing business under the name of the Service Warehouse Company had executed a note in the sum of $5,000, payable to the defendant, the Planters National Bank and Trust Company, and that said note was endorsed by the defendant, P. H. Collie. That said note had been deposited with the defendant, the Planters National Bank and Trust Company, as security for any overdraft in the account of the Service Warehouse Company with said Planters National Bank and Trust Company, during the tobacco selling season of 1931.

At the close of all the evidence at the trial, the defendant, P. H. Collie moved for judgment as of nonsuit on the cause of action alleged in the complaint against him. The motion was allowed, and the action was dismissed as to said defendant. The plaintiff did not except to or appeal from the judgment dismissing the action as to the defendant, P. H. Collie.

The said defendant, P. H. Collie, also moved for judgment as of nonsuit on the cause of action alleged against him, in the further answer of the defendant, the Planters National Bank and Trust Company. This motion was allowed, and the cross-action of the defendant, the Planters National Bank and Trust Company, against the defendant, P. H. Collie, was dismissed. The defendant, the Planters National Bank and Trust Company, excepted to and appealed from the judgment dismissing its cross-action against the defendant, P. H. Collie.

The issues arising upon the pleadings of the plaintiff and the defendant, the Planters National Bank and Trust Company, were submitted to the jury and answered as follows:

"1. Did the defendant bank contract and agree with the defendants J. S. Collie and R. M. Sanford, copartners, doing business under the name of the Service Warehouse Company, that said bank, for a valuable consideration, would pay all checks drawn upon it by the Service Warehouse Company in connection with the operation of its business during the tobacco selling season of 1931? Answer: Yes.

2. Were the checks declared upon in the complaint issued to the plaintiff by the Service Warehouse Company in connection with the operation of its business during the tobacco selling season of 1931? Answer: Yes.

3. If so, were the said checks returned unpaid by said defendant bank when presented for payment? Answer: Yes.

4. In what amount, if any, is defendant bank indebted to the plaintiff? Answer: $568.33, with interest."

After the issues had been answered, and the verdict returned by the jury, the defendant, the Planters National Bank and Trust Company, moved the court to set aside the verdict and order a new trial. The motion was allowed by the court in the exercise of its discretion. The defendant, the Planters National Bank and Trust Company then demurred *ore tenus* to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action against said defendant. The demurrer was sustained, and the plaintiff excepted.

From judgment dismissing the action as to the defendant, the Planters National Bank and Trust Company, the plaintiff appealed to the Supreme Court.

Cooley & Bone for plaintiff.

J. P. Bunn and Battle & Winslow for defendant, the Planters National Bank and Trust Company.

I. T. Valentine for defendant, P. H. Collie.

CONNOR, J. The order of the court setting aside the verdict at the trial of this action, and ordering a new trial, is not reviewable by this Court. The order was made by the trial court in the exercise of its discretion. For that reason the plaintiff did not appeal from the order. In *Bird v. Bradburn,* 131 N. C., 488, 42 S. E., 936, it is said that the power of a trial court to set aside a verdict and to order a new trial, in its discretion, is inherent, and is necessary to the proper administration of justice, which is after all the function of a court. The power is recognized by statute (C. S., 591); its exercise at any time during the term at which the action was tried has been uniformly approved by this Court. *In re Beal,* 200 N. C., 754, 158 S. E., 388, *Likas v. Lackey,* 186 N. C., 398, 119 S. E., 763, *Cooper v. Clute,* 174 N. C., 366, 93 S. E., 915, *Abernethy v. Yount,* 138 N. C., 337, 50 S. E., 696.

After the verdict was set aside by the court in the exercise of its discretion, the defendant, the Planters National Bank and Trust Company, demurred *ore tenus* to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action against said defendant. This demurrer was heard by the court, and after argument by counsel for both plaintiff and defendant was sustained.

The cause of action alleged in the complaint is founded upon certain checks described therein. These checks are payable to the order of the plaintiff, and were drawn on the defendant, the Planters National Bank and Trust Company. It is alleged that the checks were duly presented by the plaintiff to the defendant, for payment, and that upon such presentment payment was refused. It is not alleged that the defendant had accepted the checks, and thereby become liable to plaintiff as the holder of the checks. C. S., 3171.

It is well settled as the law that the payee or other holder of a check, which has not been accepted or certified by the drawee bank cannot maintain an action to recover of said bank the amount of the check. 7 C. J., 698. In *Bank v. Bank,* 118 N. C., 783, 24 S. E., 524, it is said that the holder of a check cannot maintain an action against the bank upon which the check is drawn, until after the acceptance of the check by the bank. In the opinion in that case, it is said: "This is the uniform line of decisions in the Federal Courts and our own, and it is sustained by the overwhelming weight of authority in other courts, though there are a few decisions in other states to the contrary. The bank is the agent of the drawer; till acceptance of the check, it has assumed no liability to the payee; its liability, if any, is to the drawer whose checks it has agreed to pay, if it has the drawer's funds in hand, and for breach of that contract, it is liable to the drawer, and not to the payee."

This well settled principle is applicable to the instant case, and fully supports the judgment dismissing the action as to the defendant, the planters National Bank and Trust Company. It is not necessary to decide the question discussed by counsel in their briefs filed in this Court as to whether the contract alleged in the complaint between the defendant, the Planters National Bank and Trust Company, and the defendants, J. S. Collie and R. M. Sanford, copartners, doing business under the name of the Service Warehouse Company, is valid or not. Conceding that the contract is valid as between these defendants, it does not follow that the plaintiff can recover of the defendant, the Planters National Bank and Trust Company on the principle of *Gorrell v. Water Supply Co.,* 124 N. C., 328, 32 S. E., 720. That case is readily distinguishable from the instant case. Neither *Ballard v. Bank,* 91 Kan., 91, 136 Pac., 935, nor *Saylors v. Bank,* 99 Kan., 515, 163 Pac., 454, are authorities in support of the contention of the plaintiff in this case. In both these cases, the drawee bank was interested in the livestock which the drawer of the check had purchased from the holder.

As the judgment in the appeal of the plaintiff must be affirmed, it follows that the judgment in the appeal of the defendant, the Planters National Bank and Trust Company, must also be affirmed. The plaintiff is not entitled to recover in this action of either the defendant, the

Planters National Bank and Trust Company, or the defendant, P. H. Collie. The judgment dismissing the action as to the defendant, the planters National Bank and Trust Company, and the judgment dismissing the cross-action of said defendant against the defendant, P. H. Collie, are both

Affirmed.

JOSEPH ARTHUR BANKS v. JAMES A. MAXWELL.

(Filed 11 October, 1933.)

Animals B a—Evidence held insufficient to warrant recovery by plaintiff for injury sustained when gored by bull.

In order to recover for an injury inflicted by a domestic animal plaintiff must show that the animal was vicious or dangerous and that the owner had knowledge, actual or constructive, of the vicious propensity of the animal, and in this action to recover damages by an employee on a farm for injuries sustained when plaintiff was gored by a bull that he was instructed to take to pasture, defendant's motion as of nonsuit was properly granted, there being no evidence that the bull had ever previously attacked any person or had given signs of viciousness, or that defendant had knowledge of any vicious propensity in the animal, and, *held further*, the bull's habitual bellowing and pawing of the ground when taken to pasture was not evidence of vicious propensity, such actions being normal behavior in a bull.

CIVIL ACTION, before *McElroy, J.*, at March Term, 1933, of HENDERSON.

Plaintiff instituted this action to recover damages for serious injuries sustained by being gored by a bull owned by the defendant. The plaintiff was a boy eighteen years of age, and had been raised on a farm, and on 10 July, 1931, was working on the farm of defendant.

The narrative of the injury is substantially as follows:

"Mr. Maxwell had a bull on the place, but prior to 10 July, 1931, I had never been called upon to perform any service whatever in regard to the bull. I had never had any experience and did not know anything about handling bulls. Mr. Maxwell never told me or gave me any instructions about how to handle the bull. . . . The bull was kept in a pen back of the dairy barn, and the pen was between twenty and thirty by sixty feet. . . . The lot was enclosed and made out of rails and poles and was built on one side of the barn. . . . The bull was in this lot or pen on the morning of 10 July, 1931, at the time I finished milking. The pen had a gate leading into it. On the morning of 10 July, 1931, after I had finished milking, Mr. Maxwell told me to take the bull out of the lot and drive him to the pasture. He told me to go into the pen and run him out. When he told me to go into the pen I at first hesitated. I had no idea what the brute was. . . . I picked up a club and started in, but he told me not to hit the brute with the club and I dropped it. I had not any more than dropped it until he turned on me, knocked me down and gored me. He rolled me around and gored me. . . . He was rolling me with his head. He pushed me to the lower side of the pen and I got out of the pen. . . . In the thirty days prior to July, 1931, I worked for Mr. Maxwell not less than ten days. I suppose I worked for him more than a third of the time. . . . Sometimes when I came in early I saw them driving the bull in and I had seen them driving him out. Sometimes my brother drove him out. He is eighteen years old. . . . I never saw anybody have trouble taking him out. I had never seen anybody put the dogs on him and drive him to the pasture. . . . I had seen Arthur Lance drive him. He is about twenty-five years old. He was just coming on behind him and the bull was just going on into the pen. . . . I have heard some people talk about bulls, but I did not know anything about that one. . . . Before going into the pen I picked up a stick. The stick was about the size of my arm and about eighteen inches long. . . . Mr. Maxwell told me not to hit him. I don't know how close I was to him when I raised the stick. I went to draw it back and when I did he told me not to hit the bull. . . . My brother had not been attending to the bull very long—not more than a month and a half, if that long. . . . After the bull had me down and was goring me Mr. Maxwell hissed the dog on the bull. I don't know if the dog was there when I went into the pen, but while the bull had me down the dog commenced barking and I suppose Mr. Maxwell hissed him on."

Another witness for plaintiff said: "I drove the bull from the pen to the pasture and drove him back in. Sometimes Lance would drive the bull, but I drove it most of the time. . . . When I would drive the bull from the pen down to the pasture he would bellow and paw the ground and burrow in the ground with his head all the way down the pathway. Sometimes he would stop and refuse to go on. . . . When I would drive the bull from the pen to the pasture he behaved all the way down and almost every day as I have described already."

At the conclusion of plaintiff's evidence there was judgment of nonsuit and the plaintiff appealed.

R. L. Whitmore for plaintiff.
Redden & Redden for defendant.

BROGDEN, J. What are the essentials of liability for injury inflicted by a bull?

The ancestry and social standing of a bull antedates the pyramids of Egypt. Indeed, the written record reveals that in the first civilization along the stretches of the Nile a bull was a god. He was an emblem and symbol of vitality and ancient Egyptians worshipped vitality. The same impulse therefore that constructed the pyramids also endowed the bull with divinity.

It is true that his fighting qualities have often been used for describing fear. For instance, the Sweet Singer of Israel, attempting to describe his sense of fear and depression, wrote: "Many bulls have compassed me; strong bulls of Bashan have beset me round. They gaped upon me with their mouths as a ravening and roaring lion." Psalms 22:12-13.

The familiar rule of liability for injuries inflicted by cattle has remained approximately constant for more than three thousand years. This rule of liability was expressed by Moses in the following words: "If an ox gore a man or a woman that they die; then the ox shall be surely stoned and his flesh shall not be eaten, but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death. If there be laid on him a sum of money, then he shall give for the ransom of his life whatsoever is laid upon him." Ex. 21:28-30.

This Court declared in *Rector v. Coal Co.,* 192 N. C., 804, 136 S. E., 113, that a person injured by a domestic animal, in order to recover damages, must show two essential facts: (1) "The animal inflicting the injury must be dangerous, vicious, mischievous or ferocious, or one termed in the law as possessing a vicious propensity." (2) "The owner must have actual or constructive knowledge of the vicious propensity, character and habits of the animal." The same principle was announced in *Cockerham v. Nixon,* 33 N. C., 269, this case involved an injury committed by a bull.

In the case at bar there was no evidence offered tending to show that the bull had ever attacked a person or threatened to do so, nor that he was "wont to push with his horn in time past"; nor was there evidence that the owner had actual or constructive knowledge of any vicious propensity of the animal. It is true that a witness said that each morning when the bull was turned out of the pen "he would bellow, paw the ground, and burrow in the ground with his head." Those bred to the soil perhaps know that such acts on the part of a normal bull constituted *per se* no more than boastful publicity or propaganda, doubtless designed by the animal to inform his bovine friends and admirers that he was arriving upon the scene.

At any rate the trial judge correctly interpreted the prevailing principle of law as held and promulgated in this State.

Affirmed.

MRS. DIXIE MESSER v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 11 October, 1933.)

Appeal and Error F a—Exceptions taken in county court will not be considered in Supreme Court upon appeal from Superior Court judgment.

Where an appeal is taken from a general county court to the Superior Court upon error assigned, but the only exception and assignment of error on appeal from the Superior Court to the Supreme Court is to the judgment of the Superior Court, the Supreme Court will affirm the judgment of the Superior Court when no error appears in the judgment or the record proper.

APPEAL by defendant from *Alley, J.,* at June Term, 1933, of BUNCOMBE. Affirmed.

This was a civil action to recover on an insurance policy in the sum of $2,500 issued by the defendant to William Roger Messer, husband of the plaintiff, tried before his Honor, J. P. Kitchin, and a jury, at the regular March Term, 1933, of the General County Court of Buncombe County.

At the conclusion of the plaintiff's evidence the defendant moved for a judgment as of nonsuit. The motion was denied, and the defendant excepted. At the conclusion of all the evidence this motion was renewed, and again denied, and the defendant excepted.

The jury awarded the plaintiff a verdict in the sum of $2,500, with interest thereon from 23 May, 1932, and judgment was signed accordingly. To the signing of the judgment defendant excepted and appealed to the Superior Court.

It is admitted by all the parties that the premium was paid up to the time of the death of the insured, and that the insured died as the result of an aeroplane accident sustained on 23 May, 1932, and that Mrs. Dixie Messer is the widow of William Roger Messer, deceased. That on or about 28 July, 1931, the defendant issued and delivered its policy of insurance No. 436183, in face amount of $2,500, to William Roger Messer; that the beneficiary named in said policy is Dixie Messer, wife of the insured if living, otherwise to insured's surviving children, share and share alike.

As a defense the defendant alleges:

"(1) That attached to and forming a part of said policy of insurance referred to in the complaint, being defendant's policy No. 436183 dated 28 July, 1931, in the face amount of $2,500 issued by the defendant upon the life of William Roger Messer, was a rider generally designated as an aviation rider in words and figures as follows: "Form 1705—500

8-30 M. Rider attached to and forming part of Policy No. 436183 issued to William Roger Messer. (Aviation Rider.) Death as a result of service, travel or flight in any species of air craft, except as a fare-paying passenger, is a risk not assumed under this policy, but if the insured shall die as a result, directly or indirectly, of such service, travel or flight, the company will pay to the beneficiary the reserve on this policy. Dated 28 July, 1931—Jefferson Standard Life Insurance Company." That as aforesaid, the above mentioned rider was attached to and was a part of said contract of insurance at the time of its issuance and delivery by the defendant to said William Roger Messer.

(2) That as defendant is informed and believes and, therefore, alleges, said insured, William Roger Messer, came to his death as a result of travel or flight in an aeroplane owned by himself and in which he was riding at the time of his death not as a fare-paying passenger; that by reason of the fact that the insured came to his death directly as a result of travel or flight in an aeroplane when he was not a fare-paying passenger entitles the plaintiff to recover of the defendant only the reserve on said policy at the time of the death of said insured; that the reserve on said policy at the time of the death of the insured amounted to the sum of $9.83, which said sum the defendant herewith pays into the registry of this court in complete and final discharge of any and all sums due by it by virtue of said contract of insurance. Wherefore, having fully answered the complaint of the plaintiff, the defendant prays the court that this action be dismissed and that it recover its costs of the plaintiff." There was sufficient evidence, to be submitted to the jury on the part of plaintiff to the effect that the "aviation rider" was not attached to the policy of insurance when delivered. This question of fact was decided by the jury in favor of the plaintiff in the General County Court of Buncombe County.

The defendant made numerous exceptions and assignments of error on the trial in the General County Court of Buncombe County, and appealed to the Superior Court. These exceptions and assignments of error were heard by the court below and the following judgment rendered: "This cause coming on to be heard and being heard on appeal from the General County Court of Buncombe County, before his Honor, Felix E. Alley, judge presiding and holding the Superior Court of Buncombe County, North Carolina: After argument by counsel and written briefs, it is ordered, adjudged and decreed that the judgment of the General County Court shall be and said judgment is hereby in all respects affirmed, and every exception of the defendant, appellant, is hereby overruled. This 28 June, 1933. FELIX E. ALLEY, *Judge Presiding.*"

The defendant, in accordance with the practice and procedure in civil cases on appeal from the General County Court of Buncombe County, duly grouped its exceptions and assignments of error—eight in all. These were heard in the court below and overruled and the defendant appealed to this Court.

Cathey & Cathey for plaintiff.
Johnson, Smathers and Rollins for defendant.

PER CURIAM. In the record, as to judgment in the court below and the ruling of the court below on exceptions and assignments of error from the General County Court of Buncombe County to the Superior Court, we find: "The defendant, in apt time excepted to the signing of the judgment as appears of record and to the ruling of the court." Nowhere in the record does it show any exceptions and assignments of error from the court below to this Court. In *Smith v. Texas Co.,* 200 N. C., 39, (41), is the following: "In the absence of assignments of error appearing in the transcript on an appeal to this Court, the appeal will ordinarily be dismissed on the motion of the appellee. Where, however, no error appears in the record proper, the judgment may be affirmed. In the instant case, the only exception appearing in the record, is to the judgment. We find no error in the judgment. The exceptions cannot be sustained." McIntosh N. C. Practice & Procedure in Civil Cases, p. 65. *Cook v. Bailey,* 190 N. C., 599. This question has also been decided in *Bakery v. Ins. Co.,* 201 N. C., 816.

In the judgment we find no error. For the reasons given, the judgment is

Affirmed.

M. E. HOBBS v. D. H. KIRBY AND SOUTHERN BISCUIT COMPANY, INCORPORATED.

(Filed 11 October, 1933.)

1. **Trial D a—On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff.**

   Upon a motion of nonsuit all the evidence, whether offered by plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Automobiles C m—Evidence of defendant's negligence in driving held sufficient to be submitted to jury.**

   Evidence tending to show that the rear of plaintiff's car had passed the center of the intersection of two city streets when it was struck by a car driven by defendant approaching the intersection from plaintiff's left, that defendant drove his car at a speed greatly in excess of the legal maximum in approaching the intersection and drove down the middle of the street, and that the front of defendant's car struck the left rear wheel of plaintiff's car, resulting in serious damage to plaintiff's car and injury to plaintiff, and that plaintiff was driving slowly when he entered the intersection, *is held*, sufficient to overrule defendant's motion as of nonsuit in plaintiff's action for actionable negligence.

3. Appeal and Error E b—

Where the charge of the court below is not in the record the charge is presumed to be without error.

APPEAL by defendants from *Frizzelle, J.*, and a jury, at May-June Term, 1933, of WAYNE. No error.

The material allegations in the complaint are as follows: "That, on or about 22 March, 1932, while the plaintiff was driving his Chevrolet coupe in a northerly direction on the right-hand side of Leslie Street in the city of Goldsboro at a point where said Leslie Street intersects with Ash Street; that as plaintiff entered said intersection the automobile of the defendant, Southern Biscuit Company, Incorporated, operated by the defendant, D. H. Kirby, approached from the west on Ash Street in a rapid and reckless manner, and on the left-hand side of said street; and as the plaintiff sought in every possible manner to avoid a collision, the said defendant D. H. Kirby drove the automobile of the said Southern Biscuit Company, Incorporated, suddenly and violently into the rear end of the plaintiff's automobile, throwing the plaintiff so violently against the right-hand door of his automobile that it broke said door open and threw the plaintiff with great force and violence out of said car and eight or ten feet beyond the right side thereof, thereby causing the plaintiff the painful, serious and permanent injuries hereinafter set forth in detail; and that the car driven by the said defendant D. H. Kirby was proceeding at such reckless speed and was driven in such a reckless manner that, even after so ejecting the plaintiff from his automobile, the said automobile of the plaintiff was pushed and thrown by the force of the defendant's car up onto the sidewalk on the east side of Leslie Street and whirled completely around so that it remained on said sidewalk facing in a westerly direction, thereby damaging said automobile in the manner hereinafter set forth in detail," etc. The plaintiff further alleged that defendant Kirby violated numerous statutes in reference to the law of the road, and set same forth.

The defendant Kirby denied the material allegations of the complaint and set up the plea that plaintiff was guilty of contributory negligence. The defendant admits "That on or about 22 March, 1932, the defendant, D. H. Kirby, was driving his automobile, about the business of the defendant, Southern Biscuit Company, Incorporated, in an easterly direction along Ash Street in the city of Goldsboro, N. C." This admission was introduced in evidence by plaintiff.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. If so, did plaintiff by his own negligence contribute to his own injury? Answer: No.

3. What damages, if any, is plaintiff entitled to recover? Answer: $5,000."

The court below rendered judgment on the verdict. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. A. Dees and Kenneth C. Royall for plaintiff.
Thos. W. Ruffin for defendants.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence, the defendants made motions for judgment as in case of nonsuit. The court below overruled these motions, and in this we can see no error. The plaintiff's evidence fully sustained the allegations of the complaint. It is the well settled rule that upon a motion as of nonsuit the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference to be drawn therefrom.

The plaintiff testified, in part: "I eased into this street going slow, and looked, that was to my right, and saw nobody and looked down here to my left and saw a man over here. . . . I know this man was 35 or 40 yards down that street coming up on that side, and when I saw him coming so fast, instead of making my circle and going down I would have met him, and I decided I would go on up to the next block and go around that short block and come into town to keep from being in his way, but I eased on across and when my car was entering up on there, going across, this man, if he ever made any turn at all I don't know it. I kept looking out my window wondering if he ever would turn to his right, and just as I was entering upon this sidewalk on farther side of Ash Street, this man came up and ran under the rear end of my car, striking the left corner, and I saw my car and heard the lick and a great crash, and my car went up . . . *I believe he was 40 yards and perhaps more, coming flying.* I saw that as I was entering the street."

Fletcher McGlohon testified, in part: *"Mr. Hobbs' car was a little over half way the street on the left-hand side at the time they struck.*

The rear of his car had passed the center of the street before they struck. . . . He was headed north crossing the street; Mr. Kirby's car was going east; the front part of Mr. Kirby's car struck Mr. Hobbs' car. The left-hand back wheel of Mr. Hobbs' car was struck. Mr. Kirby's car was about the middle of Ash Street when he hit Mr. Hobbs, going in an easterly direction. After it was struck Mr. Hobbs' car went over on the sidewalk and hit a telegraph pole and bounced back. It went up on the sidewalk and hit the pole. . . . At the time his car was struck Mr. Hobbs was traveling about 15 miles per hour."

Ardelia Parks testified, in part: "I saw Mr. Hobbs' car coming. He was driving somewhere about 15 miles an hour, I reckon, very slow. He was coming down Leslie toward Ash Street. I saw the Kirby car coming. When I got to Ash Street, I ran across. *I saw Mr. Kirby's car coming; he was making 40 to 50 or 60 miles an hour climbing that hill,* and I ran across to keep from getting struck. I saw the Kirby car when it struck Mr. Hobbs, *because I had just made my escape and turned around to see how quickly he passed.* He struck the rear end of Mr. Hobbs' car. *At the time he struck Mr. Hobbs' car it had gone very near across the street intersection.* Mr. Hobbs' car climbed the telegraph pole when it was hit, it swung around. It was headed for that lady's porch when it hit. Mr. Hobbs was lying collapsed in the street, blood just streaming. . . . *I ran because he was running reckless.*"

The defendant contended that he was not to blame and was within the law of the road. "I saw that he dashed in front of me all of a sudden. . . . I am a salesman for the Southern Biscuit Company. I was going that morning on a business trip."

The charge of the court below is not in the record, the presumption is that the court below charged every principle of law applicable to the facts. The question of negligence, contributory negligence and damage were facts for the jury to determine—they decided in favor of plaintiff. In law we find

No error.

IN THE MATTER OF AVALON E. HALL, ADMINISTRATOR OF ROWAN D. SAUNDERS, DECEASED.

(Filed 11 October, 1933.)

Insurance N a—Distributees of War Risk Insurance are to be determined as of death of soldier and not as of death of beneficiary.

The distributees of a policy of War Risk Insurance are the heirs at law of the deceased soldier as determined by our statute of distribution as of the date of the soldier's death, and not as of the time of the death of the beneficiary named in the policy, and where a soldier dies without wife, children, issue of children, or mother him surviving, the father is his sole heir, C. S., 137(6), and although the balance due after payment of the monthly benefits to the beneficiary cannot be distributed until after the beneficiary's death, where the father is named beneficiary such balance, after the father's death, should be paid the father's executor and will pass under the father's will as against the brothers and sisters and half-brothers and half-sisters of the deceased soldier surviving the deceased soldier's father.

CIVIL ACTION, before *Schenck, J.*, at June Term, 1933, of WILKES.

Substantially the facts are these:

1. Rowan D. Saunders, a resident of North Carolina, was an American soldier and was killed in action in France on 17 October, 1918.

2. At the time of his death the said soldier held a policy of war risk insurance in the amount of $10,000, payable to his father, William Saunders.

3. William Saunders, father of the deceased and beneficiary in said insurance policy, was married three times. By the first marriage six children are now surviving, and said children are the half-brothers and sisters of the deceased soldier. Of the second marriage three children are now surviving, and these children are brothers and sisters of the whole blood of the deceased soldier. The third wife, Ellen Saunders, is now living.

4. After the death of the soldier in 1918, the Federal Government paid to the father, William Saunders, beneficiary in the policy aforesaid, monthly installments of $57.50.

5. The father and beneficiary died on 17 July, 1931, leaving children as aforesaid, and also leaving a last will and testament, dated 14 November, 1920, by the terms of which will the said William Saunders left his entire estate to his third wife, Ellen Saunders, "for the term of her natural life, the income from same to be used by her and so much of the principal as necessary for her maintenance and support during the term of her natural life, and the remainder to go to the specific heirs set out in said will, to wit, Carrie Elizabeth Dixon, Frederick Daniel Saunders, and Cicero Erastus Saunders. Ellen Saunders is named as executrix in said will and has duly qualified and has entered upon her duties as said executrix."

6. After the death of the beneficiary and father, William Saunders, the Government paid the commuted value of the remaining installments to Avalon E. Hall, administrator of the estate of the deceased soldier. The amount of such sum is $4,376.

7. Frederick Daniel Saunders, brother of the whole blood of the deceased, filed a petition in bankruptcy on 15 November, 1932, and his

trustee in bankruptcy, to wit, Van B. Melchor, claims the interest of said bankrupt in said estate.

The trial judge was of the opinion that the brothers and sisters of the deceased soldier and the trustee in bankruptcy were entitled to the fund, and that Ellen Saunders, executrix under the will of William Saunders, deceased, "has no right, title or interest to any of the proceeds belonging to the estate of Rowan D. Saunders, now in the hands of Avalon E. Hall."

From the foregoing judgment Avalon E. Hall, administrator, and Ellen Saunders, executrix of William Saunders, appealed.

Jones & Brown for Ellen Saunders and Avalon E. Hall, administrator.

W. M. Allen for brothers and sisters of deceased soldier.

Felix L. Webster for Melchor, trustee in bankruptcy.

BROGDEN, J. Who were the distributees of the personal estate of Rowan D. Saunders at the time of his death in October, 1918?

This Court has consistently held that the distributees of a deceased soldier, holding war risk insurance, are to be ascertained at the date of the death of the soldier, in accordance with the intestate laws of the state in which the soldier lived.

It appears from the record that the mother of the deceased soldier was dead prior to 1918, but that his father was living, and that the soldier had no wife or child or issue of a child at the time of his death. Consequently, our statute of distribution C. S., 137, subsec. 6, vested the personal estate of the deceased in the father as sole distributee under the intestate laws of this State. Of course, the final distribution of the estate is postponed until the death of the beneficiary named in the policy. This Court pointed out in *Grady v. Holl,* 199 N. C., 666, 155 S. E., 565, the confusion which may arise in failing to distinguish between the right of property under the intestate law and the right of enjoyment which is postponed until the death of the beneficiary. Therefore, if the money belonged to the father on and after 17 October, 1918, he had a right to dispose of it by will. This he did, and the property must be distributed in accordance with the will of the deceased, William Saunders, as no question is raised as to the validity of the will. See *In re Estate of Pruden,* 199 N. C., 256, 154 S. E., 7.

Reversed.

BANK OF LEWISTON v. LILLIAN I. HARRINGTON AND C. HOGGARD, AND BANK OF LEWISTON v. LILLIAN I. HARRINGTON AND P. C. BURKETT.

(Filed 11 October, 1933.)

1. **Bills and Notes A a—Cancellation and surrender of deceased husband's notes to widow held sufficient consideration for widow's notes.**

   Where a widow executes notes to a bank and receives from the bank notes executed by her husband before his death, the bank marking the husband's notes paid and delivering them to the widow, the widow may not maintain that she was not liable on the notes executed by her because they were not supported by consideration, the surrender and cancellation of the notes executed by the deceased husband and the release of his estate from liability being sufficient consideration for the widow's notes. *Bank v. Dickson*, 203 N. C., 500, and *Loan Asso. v. Swaim*, 198 N. C., 14, cited and distinguished.

2. **Same—Presumption of consideration for negotiable notes.**

   It is presumed, prima facie, that negotiable notes are issued by the maker for a valuable consideration, C. S., 3004, with the burden on the maker to show failure of consideration when relied on by him.

3. **Contracts A d—**

   Any benefit, right or interest accruing to the promisor, or any forbearance, detriment or loss suffered or undertaken by the promisee is sufficient consideration to support a contract.

APPEAL by defendant, Lillian I. Harrington, from *Daniels, J.,* at February Term, 1933, of BERTIE. Affirmed.

The above entitled actions were begun and tried in the General County Court of Bertie County. By consent of the parties, the actions were consolidated for the purpose of trial, and were tried together.

From judgment in each action that the plaintiff recover of the defendants on the note described in the complaint therein, the amount of said note, with interest and costs, the defendant, Lillian I. Harrington, appealed to the Superior Court of Bertie County.

At the hearing of the said appeals, the judgment in each action was affirmed by the Superior Court, and the defendant, Lillian I. Harrington, appealed to the Supreme Court.

J. H. Matthews for plaintiff.
J. Gay Harrington and J. A. Pritchett for defendant.

CONNOR, J. The defendant, Lillian I. Harrington, is the widow of H. G. Harrington, who died intestate in Bertie County on 27 November, 1931. At the date of his death, the said H. G. Harrington was indebted to the plaintiff (1) in the sum of $250.00, as evidenced by a note executed by him as maker, and endorsed by the defendant, C. Hoggard, and (2) in the sum of $150.00, as evidenced by a note executed by him as principal and by the defendant, P. C. Burkett, as surety. Both these notes were due at or shortly after the death of the said H. G. Harrington.

On 5 December, 1931, at the request of the defendant, C. Hoggard, the defendant, Lillian I. Harrington, executed a note in the sum of $250.00, due and payable on 20 December, 1931. This note was endorsed by the defendant, C. Hoggard, and is payable to the order of the plaintiff. Upon the delivery of this note to it, the plaintiff marked the note which was executed by H. G. Harrington as maker, and endorsed by the defendant, C. Hoggard, "Paid," and delivered the same to the defendant, Lillian I. Harrington. The said note is now held by the plaintiff and has not been paid.

On 7 December, 1931, at the request of the defendant, P. C. Burkett, the defendant, Lillian I. Harrington, executed a note in the sum of $150.00, due and payable on 8 January, 1932. This note was executed by the defendant, P. C. Burkett, as surety, and is payable to the order of the plaintiff. Upon the delivery of this note to it, the plaintiff marked the note which was executed by H. G. Harrington as principal and by the defendant, P. C. Burkett, as surety, "Paid," and delivered the same to the defendant, Lillian I. Harrington. The said note is now held by the plaintiff, and has not been paid.

The contention of the defendant, Lillian I. Harrington, that there was no consideration for either of the notes executed by her, and now held by the plaintiff, cannot be sustained. Both said notes are negotiable instruments, and for that reason are deemed prima facie to have been issued by the defendant, Lillian I. Harrington, the maker of each note, for a valuable consideration. C. S., 3004. There was no evidence at the trial of the actions in the General County Court to rebut this statutory presumption; all the evidence showed affirmatively that each note was issued by the defendant for a valuable consideration. Any benefit to the promisor, or any loss or detriment to the promisee is a sufficient consideration to support a contract. *Fawcett v. Fawcett,* 191 N. C., 679, 132 S. E., 796. In a legal sense, a valuable consideration may consist in some right, interest or benefit accruing to one party, or in some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other. *Trust Co. v. Anagnos,* 196 N. C., 327, 145 S. E., 619. See *Warren v. Bottling Co.,* 204 N. C., 288, 168 S. E., 226; *Basketeria Stores, Inc., v. Indemnity Co.,* 204 N. C., 537, 168 S. E., 822. This principle is elementary, and is applicable to the facts shown by all the evidence in the instant case, which is readily distinguishable from *Bank v. Dickson,* 203 N. C., 500, 166 S. E., 322, and from *Building and Loan*

Association v. Swaim, 198 N. C., 14, 150 S. E., 68. In neither of these cases, which are cited by defendant in support of her contentions in this case, had the plaintiff suffered any loss or detriment as a consideration for the note executed by the widow, who had received no benefit by reason of the note. In the instant case the plaintiff had surrendered the notes of the deceased husband, and thereby discharged his estate from liability for said notes. 8 C. J., 219. This was a sufficient consideration for the notes sued on in these actions. There was no error in the judgments of the Superior Court in these actions.

Affirmed.

MYRTLE SERLS v. FRANK H. GIBBS AND W. T. POLK, ADMINISTRATORS OF TASKER POLK, DECEASED, TRUSTEE, AND R. K. CARROLL.

(Filed 11 October, 1933.)

Mortgages H b—Where notes and power of sale are barred by statutes of limitation mortgagor may restrain sale without paying notes.

A mortgage or deed of trust follows the debt and is an incident thereto and security therefor, and where notes secured by a mortgage are barred by the statute of limitations, and the power of sale contained in the instrument is barred by the lapse of over ten years from the date of the last payment on the notes, C. S., 437(3), 2589, the mortgagor may restrain the trustee in the instrument from foreclosing under the power of sale therein contained, and the trustee's contention that the mortgagor would have to pay the amount of the notes in order to be entitled to the equitable relief of restraining the foreclosure on the principle that he who seeks equity must do equity, is unavailing.

CIVIL ACTION, before *Daniels, J.,* at January Term, 1933, of WARREN.

On 8 February, 1905, S. E. Loyd, executed and delivered to Tasker Polk, trustee, a deed of trust, recorded in Book of Mortgages 70, page 537, registry of Warren County, securing an indebtedness of $996.00, evidenced by four notes of $249.00 each, payable to W. G. Rogers on 8 February, 1906, 1907, 1908, and 1909, respectively. Tasker Polk, the trustee named in the deed of trust, is dead, and the defendants, Gibbs and Polk, are his administrators. The mortgagor, Stephen E. Loyd, died in October, 1912, leaving eight children. The plaintiff is one of said children, and she and her brothers and sisters have been in possession of said land since the death of their father. Mrs. Loyd qualified as administrator of her husband and made a final account, which was duly approved by the clerk on 20 March, 1916. This account shows that the balance due on the land, amounting to $655.56, was paid by her.

There was evidence tending to show that the notes had been paid, and other evidence tending to show the contrary. Rogers, the payee in the notes, hypothecated said notes with the defendant Carroll to secure a loan of $1,000.

The defendants as administrators undertook to sell the land under said deed of trust and were restrained until the hearing. The plaintiff pleaded that the power of sale in the deed of trust was barred by the ten-year statute of limitations, and that the notes were also barred by the statute. The action was commenced on 25 January, 1932, practically twenty-eight years after the notes and deed of trust were given, and approximately twenty-one years after the death of the mortgagor. It was admitted that one of the notes had been paid.

The following issues were submitted to the jury:

1. "Have the three notes secured by the deed of trust described in the complaint, been paid?"

2. "Are the notes and the power of sale in the deed of trust set out in the complaint barred by the statute of limitations?"

The trial judge charged the jury that if they believed the evidence, and found the facts to be as testified to by the witness, they would answer the first issue "No," and the second issue "Yes." Said issues were thereupon answered accordingly, and from judgment upon the verdict the defendants appealed.

W. W. Taylor, W. W. Taylor, Jr., and R. B. White for plaintiff.
Julius Banzet and Frank Banzet for defendants.

BROGDEN, J. The defendants, trustees, at the request of their codefendant, R. K. Carroll, undertook to exercise the power of sale in a deed of trust executed on 8 February, 1905, securing four notes, the last of which matured on 8 February, 1909. One of said notes had been paid by the deceased mortgagor during his lifetime, and after his death in 1912 his children and widow remained in possession of the property. The action was instituted on 25 January, 1932, to restrain the sale advertised for that date. The restraining order was continued until the hearing and the cause was duly heard at term.

The defendants contend that the verdict having established that the notes described in the complaint had not been paid that the plaintiff was not entitled to have the sale restrained without paying the amount of the indebtedness upon the familiar equitable principle that "he who seeks equity must do equity."

This Court has consistently held that a mortgage or deed of trust follows the debt and is an incident thereto and security therefor. Furthermore, C. S., 437, subsec. 3, established a bar to the foreclosure of a mortgage "after the power of sale became absolute or within ten years after the last payment on the same." And C. S., 2589 further provides that the power of sale in any mortgage or deed of trust "shall become inoperative, and no person shall execute any such power when an action to foreclose such mortgage or deed of trust . . . would be barred by the statute of limitations." It is manifest that the debt was barred; that is, unenforceable in the courts of this State, and the power of sale was barred by reason of the express mandate of the statute. Indeed, the question involved has been heretofore determined by correct interpretation of the principles of law contained in the following cases, to wit, *Graves v. Howard,* 159 N. C., 594, 75 S. E., 998; *Humphrey v. Stephens,* 191 N. C., 101, 131 S. E., 383; *Meadows v. Bryan,* 195 N. C., 398, 142 S. E., 487.

The plaintiff did not appeal from the instruction given by the trial judge upon the first issue, and consequently that phase of the case is eliminated.

Affirmed.

FIRST CAROLINAS JOINT STOCK LAND BANK OF COLUMBIA v. J. W. PAGE ET AL.

(Filed 11 October, 1933.)

Mortgages H m—Under provisions of this deed of trust purchaser at sale held not entitled to crops as against mortgagor's tenants.

The deed of trust in this case provided that the mortgagor or his assignees should hold and enjoy the premises until default in the payment of any installment of the note secured by the instrument or a breach of any of the conditions thereof, and contained an assignment by the mortgagor to the mortgagee of the rents and income from the premises for any year that any installment of the note remained unpaid. The mortgagor leased the premises to defendant who paid the rent for the calendar year and sublet the premises to his codefendants. Default was made in the payment of the installment due after defendant had paid the rent for the calendar year, and the mortgagee foreclosed and bid in the property and received deed thereto. The mortgagee then instituted this action against the lessee and sublessees of the mortgagor to recover possession of the land and for the value of the growing crops at the time of foreclosure, the mortgagor not being made a party. *Held,* the mortgagee, the purchaser at the sale, was estopped by the language of the deed of trust from claiming immediate possession of the crops as against the lessees and sublessees, it being contemplated in the deed of trust that the premises might be leased, and there being no rent falling due after the foreclosure and the rent and income from the land having already been assigned to the mortgagee as security for the debt. *Collins v. Bass,* 198 N. C., 99, and *Bank v. Purvis,* 201 N. C., 753, cited and distinguished.

APPEAL by defendants from *Cowper, Special Judge,* at April Term, 1932, of HARNETT.

Civil action in ejectment and to recover possession of all crops grown upon the Healey Farm in Harnett County during the year 1931.

The facts are these:

1. On 1 February, 1926, J. V. Healey (unmarried) executed for the benefit of plaintiff a deed of trust on his 969-acre farm in Harnett County. Said deed of trust was prepared in accordance with the "Federal Farm Loan Act," 12 U. S. C. A., chap. 7, sec. 641, *et seq.,* to secure a loan of $35,000 and provided for its payment on the amortization plan with acceleration clause, at the option of the plaintiff, and foreclosure in the event of failure to pay any of the installments falling due 1 June and 1 December of each year during the life of the encumbrance.

2. The following covenants are contained in said deed of trust:

(a) "And it is further covenanted, that the said parties of the first part, their heirs, legal representatives or assigns, shall hold and enjoy the said premises until default in the payment of the installments as provided in said note, or a breach of any of the conditions and covenants of this deed of trust shall be made."

(b) "And it is further covenanted, that as a further security for the payment of the note and all installments thereof, and for the performance of all the terms of said note and all the conditions and covenants of this deed of trust that the said parties of the first part hereby assign, set over and transfer to the First Carolinas Joint Stock Land Bank of Columbia, its successors or assigns, all of the rents and income of said premises herein conveyed for each and every year that any installment or installments of the said note may be unpaid, together with all rights and remedies for enforcing collection of the same."

3. On 2 April, 1928, Healey conveyed the farm in question to the Carolina Fruit Company, Incorporated, which assumed the payment of plaintiff's debt, and on 1 January, 1931, the Fruit Company leased the premises to J. W. Page for the calendar year. Page paid the agreed rent of $500 during the month of January and sublet the farm to his codefendants, with the understanding that he should furnish fertilizer, mules, farming implements and receive two-thirds of all crops raised on the land. The sublessees were to cultivate the crops and receive one-third as their share.

4. The taxes for the year 1930, amounting to $435.76, were not paid when they became due and payable, which the mortgagee was at liberty to pay and add to the debt secured by the deed of trust.

5. Default was made in the payment of the installment due 1 June, 1931, (the previous installments having been paid), and the trustee, at

the instance of the plaintiff, sold the property under the terms of the deed of trust.

6. The plaintiff bid in the land at said sale, and received deed from the trustee 24 August, 1931, and instituted the present action in the ensuing month of September. Only the tenant and subtenants are made parties. The Carolina Fruit Company, Incorporated, is not a party to the action.

From a judgment in favor of plaintiff for the possession of the land and for $3,000, the value of the growing crops at time of foreclosure, the lessee, J. W. Page, and his codefendants, sublessees, appeal, assigning errors.

Smith & Joyner and John H. Anderson, Jr., for plaintiff.
Clifford & Williams for defendants.

STACY, C. J. Who is entitled to the crops growing on the land at the time of the foreclosure, the plaintiff or the defendants?

It may be observed in the outset that when the land in question was leased to the defendants, January, 1931, the mortgagor was in possession with the right to "hold and enjoy the said premises" under the express terms of plaintiff's deed of trust, and it was contemplated by the parties that the mortgagor should either cultivate the farm himself or lease it for farming purposes, for it is further stipulated that the rents and income from said premises are thereby assigned to the plaintiff as security for any unpaid installments for each and every year that any installment or installments may be unpaid. Compare *Dunn v. Tillery,* 79 N. C., 497; *Killebrew v. Hines,* 104 N. C., 182, 10 S. E., 159; *Carr v. Dail,* 114 N. C., 284, 19 S. E., 235; *Hinton v. Walston,* 115 N. C., 7, 20 S. E., 164; *Credle v. Ayers,* 126 N. C., 11, 35 S. E., 128.

It would seem, therefore, that these provisions inserted in the deed of trust, take the case out of the principle announced in *Collins v. Bass,* 198 N. C., 99, 150 S. E., 706, *Bank v. Purvis,* 201 N. C., 753, 161 S. E., 386, to the effect that a purchaser at a foreclosure sale under the power contained in a mortgage is entitled to possession as against the tenant of the mortgagor claiming under a lease made with knowledge of the mortgage and after its maturity and default. 19 R. C. L., 628.

This renders it unnecessary for us to consider the effect of chapter 173, Public Laws, 1931, enacted in consequence of the decision and suggestion in *Collins v. Bass, supra.*

Nor is the principle announced in *Mercer v. Bullock,* 191 N. C., 216, 131 S. E., 580, that the purchaser is entitled to all rents falling due after the foreclosure, applicable to the facts of the present case, for, in the first place, no rents fell due after the foreclosure, and, in the second place, all the rents and the income from the premises had previously been assigned as security for the unpaid installments of each and every year. 19 R. C. L., 630. Compare *Pate v. Gaitley,* 183 N. C., 262, 111 S. E., 339.

We think the plaintiff is estopped by the terms of the deed of trust, under which it acquired title, to claim the crops in question as against the defendants. *Coxe v. Dillard,* 197 N. C., 344, 148 S. E., 545; *Peel v. Peel,* 196 N. C., 782, 147 S. E., 295.

Error.

ALICE GILMORE v. DURHAM LIFE INSURANCE COMPANY.

(Filed 11 October, 1933.)

Insurance E a—Policy of life insurance in this case held not to have become effective, the contract not having been completed.

Where an application for a policy of life insurance signed by the insured and the policy itself provide that the insurer should incur no liability thereon until the issuance of the policy and delivery thereof, and unless the insured should be alive and well at the date of its issuance and delivery: *Held,* in an action on the policy by the beneficiary a nonsuit should have been entered where all the evidence tends to show that the policy, although issued and sent to insurer's agent for delivery in accordance with the terms, had never been delivered because of the ill health of the insured at the time of its issuance, and that the insured, although in sound health at the time of the application, had been in ill health prior to the time of the issuance of the policy and had remained constantly in ill health to the date of his death.

APPEAL by defendant from *Alley, J.,* at July Term, 1933, of BUNCOMBE. Reversed.

This action was begun and tried in the General County Court of Buncombe County.

From judgment that plaintiff recover of the defendant on the policy of insurance issued by the defendant and described in the complaint, the sum of two hundred and fifty dollars with interest from 20 May, 1932, and the costs of the action, the defendant appealed to the Superior Court of Buncombe County.

At the hearing of the appeal, the judgment was affirmed by the Superior Court, and the defendant appealed to the Supreme Court.

I. O. Brady and Sale, Pennell & Pennell for defendant.

CONNOR, J. The plaintiff is the widow of Dewey A. Gilmore, who died in the city of Asheville, N. C., on 20 May, 1932. She is the beneficiary in the policy described in the complaint. This policy was issued by the defendant on 9 May, 1932, and insured the life of Dewey A. Gilmore in the principal sum of $500.00. It is provided in the policy that if the death of the insured shall occur within twelve months from the date of its issuance, only one-half of the principal sum shall be payable to the beneficiary. For this reason if the defendant is liable on the policy, the maximum amount which the plaintiff is entitled to recover in this action is $250.00.

The application for the policy described in the complaint was signed by Dewey A. Gilmore at Asheville, N. C., on 28 April, 1932. The application contains a provision as follows:

"I agree that the policy which may be granted by the company upon this application shall be accepted subject to the conditions and agreements contained therein, and that no obligation shall exist against said company under said policy, although I may have advanced premiums thereon, unless such policy is delivered to me, and unless upon its date and delivery the life proposed shall be alive, and in sound health."

The policy issued by the defendant at its home office in Raleigh, N. C., on 9 May, 1932, contains a provision as follows:

"Provided, however, that no liability is assumed by the company prior to the date hereof, nor unless on such date and on the delivery of the policy, the insured is alive and in sound health."

All the evidence at the trial showed that although the insured was in sound health at the date of the application, he was not in sound health at the date of the issuance of the policy, and that for that reason the policy was not delivered to the insured. He had become ill on 8 May, 1932, and continued ill until his death on 20 May, 1932. There was no time between the date of the issuance of the policy and the date of insured's death, when he was in sound health. After his death, the policy was returned to the defendant by its agent at Asheville, N. C., to whom it had been sent for delivery according to its terms, and who had failed to deliver it because of the unsound health of the insured. All the evidence showed that there had been no actual delivery of the policy to the insured; there was no evidence tending to show a constructive delivery of the policy, which at no time passed from the possession and control of the defendant.

By reason of the express provisions in the application signed by the insured, and in the policy issued by the defendant, the policy sued on in this action did not become effective during the lifetime of the insured. For that reason there was error at the trial in the refusal of the court to dismiss the action by judgment as of nonsuit. The judgment of the Superior Court affirming the judgment of the county court must be reversed. See *Turlington v. Ins. Co.,* 193 N. C., 481, 137 S. E., 422;

McCain v. Ins. Co., 190 N. C., 549, 130 S. E., 186; *Powell v. Ins. Co.,* 153 N. C., 124, 69 S. E., 12; *Ray v. Ins. Co.,* 126 N. C., 166, 35 S. E., 246; *Ross v. Ins. Co.,* 124 N. C., 395, 32 S. E., 733.

The action is remanded to the Superior Court of Buncombe County that judgment may be entered in said court in accordance with this opinion.

Reversed.

W. H. GRIFFIN, TRUSTEE, v. BANK OF COLERIDGE ET AL.

(Filed 11 October, 1933.)

Appeal and Error A d: D a—Formal judgment overruling demurrer is appealable, and lower court may not proceed in the cause pending appeal.

An appeal lies as a matter of right from judgment overruling a demurrer unless the demurrer is regarded as frivolous or is treated as a motion to dismiss, and where after appeal from a formal judgment overruling a demurrer the trial court proceeds to hear exceptions to the report of the referee in the cause and enters judgment affirming the report of the referee, and an appeal is taken to the second judgment, the Supreme Court, upon affirming the judgment overruling the demurrer, will order the judgment confirming the report of the referee stricken out and the cause remanded for further proceeding according to law. C. S., 655.

APPEAL by defendants from *Frizzelle, J.,* at May Term, 1933, of CHATHAM.

Civil action to recover penalty for alleged exaction of usury.

As the alleged transactions set out in the complaint covered a large number of items and involved a long accounting, a reference was ordered under the statute on motion of defendants. The report of the referee was favorable to the plaintiff and adverse to the defendants. Exceptions were filed to said report, and at the March Term (second week), 1933, Chatham Superior Court, the matter came on for hearing upon defendants' exceptions and plaintiff's motion to confirm the report of the referee, which, by consent, was continued to be heard by the judge at Sanford in Lee County on 30 March, 1933, judgment to be rendered as at term.

At the opening of the hearing in Sanford, the defendants interposed a demurrer *ore tenus* to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. A formal judgment was entered overruling the demurrer, to which the defendants excepted and gave notice of appeal to the Supreme Court. It was agreed that "the summons, complaint, answer and the foregoing judgment" should constitute the case on appeal.

Notwithstanding the appeal of the defendants from the judgment overruling the demurrer, the judge took the papers and later entered judgment dismissing defendants' exceptions, and confirming the report of the referee. The defendants excepted to this judgment and gave notice of appeal. Time allowed for settling case.

Thereafter, at the May Term, 1933, upon notice to plaintiff, the defendants made a motion to vacate the judgment of confirmation entered "out of term and out of the district." Motion denied, and the defendants again excepted and appealed. It was "ordered that this appeal be made a part of the record on appeal in the appeals heretofore entered."

I. C. Moser and Wade Barber for plaintiff.
J. H. Scott and W. R. Clegg for defendants.

STACY, C. J. The defendants have appealed three times from as many judgments in the same case.

As the demurrer, interposed by the defendants at the hearing in Sanford, and renewed here, does not "distinctly specify the grounds of objection to the complaint," it might well have been disregarded (C. S., 512), or treated as a motion to dismiss (*Elam v. Barnes,* 110 N. C., 73, 14 S. E., 621), from the refusal of which no appeal lies. *Plemmons v. Improvement Co.,* 108 N. C., 614, 13 S. E., 188.

"A motion to dismiss for want of jurisdiction or because the complaint does not state a cause of action is not such a demurrer *ore tenus* as will permit an appeal from its refusal." *Burrell v. Hughes,* 116 N. C., 430, 21 S. E., 971; *Joyner v. Roberts,* 112 N. C., 111, 16 S. E., 917.

But the demurrer was neither disregarded nor treated as a motion to dismiss. A formal judgment was entered overruling the demurrer, from which an appeal was prayed and allowed, and the case on appeal settled instanter by agreement. When this was done, it would seem the defendants were justified in assuming that their exceptions to the referee's report would not be passed upon until their appeal from the judgment overruling the demurrer had been heard and determined. C. S., 655; *Bohannon v. Trust Co.,* 198 N. C., 702, 153 S. E., 263; *Pruett v. Power Co.,* 167 N. C., 598, 83 S. E., 830.

"While the Court has held that an appeal from an interlocutory order leaves the action for all other purposes in the court below, the decision is also to the effect that the disposition of the interlocutory order and all questions incident to and necessarily involved in the ruling thereon are carried by the appeal to the appellate court"—*Hoke, J.,* in *Combes v. Adams,* 150 N. C., 64 (at page 71), 63 S. E., 186.

An appeal lies as a matter of right from a judgment overruling a demurrer, unless the demurrer be regarded as frivolous (*Joyner v. Fiber*

Co., 178 N. C., 634, 101 S. E., 373), or treated as a motion to dismiss. *Enloe v. Ragle*, 195 N. C., 38, 141 S. E., 477.

The demurrer interposed in the instant case is bad both as to substance and form, but it was dealt with as bona fide and properly overruled. It appears, therefore, from the present state of the record, that the defendants are entitled to have their exceptions to the referee's report considered and ruled upon after this opinion has been certified to the Superior Court.

The judgment confirming the report, pending the appeal from the order overruling the demurrer, will be stricken out, and the cause remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

STATE v. DAN BAILEY AND PAUL BAILEY.

(Filed 11 October, 1933.)

1. **Homicide G b—**

An intentional killing with a deadly weapon raises presumptions that the killing was unlawful and was done with malice, constituting murder in the second degree.

2. **Homicide G e: E a—Evidence of guilt of second-degree murder held sufficient, defendants' pleas of self-defense being for the jury.**

Evidence that defendants and deceased engaged in a fight about 6:30 o'clock in the evening, the defendants being armed and the deceased unarmed, and that deceased then went to another's house and secured a gun, and that deceased met defendants that night about 9:15 on a path near the scene of the first encounter, and that both defendants and deceased fired shots, one of the defendants firing the shot resulting in deceased's death, *is held* sufficient to be submitted to the jury and to sustain a conviction of second-degree murder, the defendants' plea of self-defense being for the determination of the jury under correct instructions from the court, and *held further*, defendants' exceptions to the admission of evidence of the fight earlier in the evening cannot be sustained, such evidence being helpful to them on their pleas of self-defense.

APPEAL by defendants from *Daniels, J.*, at July Term, 1933, of LEE.

Criminal prosecution tried upon indictment charging the defendants with the murder of one Price Womack.

The defendants are brothers. They had a fight with Price Womack about 6:30 o'clock on the evening of 8 October, 1932, over some liquor. They kicked and cuffed Womack about considerably. Paul had a shotgun, Dan a pistol, and Price was unarmed at the time. Following the difficulty, Womack went to the home of Clint Jones and got a shotgun, intending to pursue the matter further. He met the defendants again about 9:15 that night on a path near the railroad tracks in the town of Sanford, not far from the scene of the first difficulty. Here they engaged in a duel. Both defendants shot at Womack, but apparently Paul inflicted the death wound. The gun which the deceased had was found by his side with an empty shell in it. Evidently he had shot also.

It is the contention of the defendants that they were waylaid by Womack and that they shot him in their own proper self-defense.

Verdict: Guilty of murder in the second degree as to both defendants.

Judgment: Imprisonment in the State's prison as to each defendant for a term of not less than fifteen nor more than twenty years.

The defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

K. R. Hoyle for defendants.

STACY, C. J. Proof or admission of an intentional killing with a deadly weapon raises two presumptions against the killer: first, that the killing was unlawful; and, second, that it was done with malice. This is murder in the second degree. *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617.

Upon these presumptions the jury was justified in rendering the verdict it did in the instant case. The defendants can only regret that their pleas of self-defense were not proved to the satisfaction of the twelve. *S. v. Willis,* 63 N. C., 26.

The principles applicable to an unintentional killing, or homicide by misadventure, discussed in *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387, do not arise on the present record.

The exceptions discussed on brief present no new question of law or one not heretofore settled by a number of decisions. In no view of the case could the demurrers to the evidence have been sustained; and the testimony relative to the fight earlier in the evening was helpful to the defendants on their pleas of self-defense. Indeed, so far as the deceased was concerned, the fight did not end until he was killed. With him, the fatal encounter was but a continuation of the original altercation. *S. v. Bryson,* 203 N. C., 728, 166 S. E., 897.

The charge taken as a whole is free from reversible error. The verdict and judgment will be upheld.

No error.

W. T. FREEMAN v. GENERAL MOTORS ACCEPTANCE CORPORATION.

(Filed 11 October, 1933.)

Sales I d—Whether assignee of conditional sales contract committed trespass in repossessing car held for jury in this case.

While an assignee of a conditional sales contract on an automobile may peaceably repossess the car by going upon the purchaser's property in accordance with the terms of the contract after default in the payment of the purchase price in accordance with the agreement, where there is evidence that the agent intimidated the one in possession of the premises by loud, violent or abusive language, so that she yielded in order to avoid a breach of the peace, the question of whether the agent committed a trespass in the repossession of the car is for the jury, although the original entry may have been peaceable and lawful.

APPEAL by plaintiff from *Parker, J.*, at April Term, 1933, of WASHINGTON.

Civil action to recover damages for alleged forceable trespass.

On 28 May, 1931, the plaintiff purchased a Chevrolet sedan and executed to the seller and the General Motors Acceptance Corporation a conditional sales contract to secure deferred balance of the purchase price; said contract containing the following stipulation:

"Time is of the essence of this contract, and if the purchaser default in complying with the terms hereof, or the seller deems the property in danger of misuse or confiscation, the seller or any sheriff or other officer of the law may take immediate possession of said property without demand (possession after default being unlawful), including any equipment or accessories thereto, and for this purpose the seller may enter upon the premises where said property may be and remove same."

Default having been made in the payments as stipulated in the contract, an agent of the General Motors Acceptance Corporation went to the home of the plaintiff 27 July, 1931, and repossessed said automobile.

The plaintiff was not at home at the time. His wife was there with five small children. She testified: "I told him (defendant's agent) I heard my husband say he was going to make a payment on the car that morning, and that he could not get the car without seeing my husband, and he said he didn't have time to waste running around seeing people. . . . I would say his manner was rather harsh. . . . He did raise his voice somewhat from what he had been speaking. . . . When he left the porch, he went out to the car and called the other man and they pushed the car out and took it away. I had protested. There was nobody home but me and my children, the oldest of whom is about five years. There was no man on the premises."

From a judgment of nonsuit entered at the close of all the evidence, the plaintiff appeals.

Zeb Vance Norman for plaintiff.
W. L. Whitley for defendant.

STACY, C. J. That the defendant had the right, under its contract, peaceably to repossess the automobile is not questioned. *Jackson v. Hall,* 84 N. C., 489; *Hinson v. Smith,* 118 N. C., 503, 24 S. E., 541; *Moore v. Hurtt,* 124 N. C., 27, 32 S. E., 317; *Harris v. R. R.,* 190 N. C., 480, 130 S. E., 319; *Willis v. Whittle,* 82 S. C., 500, 64 S. E., 410; 24 R. C. L., 486.

Did its agent commit a trespass in repossessing the car? This is the only mooted point in the case. The trial court was of opinion that he did not, which position is strongly supported by the decision in *Willis v. Whittle, supra,* a South Carolina case practically on all-fours with the one at bar.

But it is the law of this jurisdiction that although an entry on lands may be effected peaceably and even with permission of the owner, yet if, after going upon the premises of another, the defendant uses violent and abusive language and commits such acts as are reasonably calculated to intimidate or lead to a breach of the peace, he would be liable for trespass *civiliter* as well as *crimiliter* (*S. v. Stinnett,* 203 N. C., 829, 167 S. E., 63), for "It may be, he was not at first a trespasser, but he became such as soon as he put himself in forceable opposition to the prosecutor." *S. v. Wilson,* 94 N. C., 839; *S. v. Earp,* 196 N. C., 164; *S. v. Tyndall,* 192 N. C., 559, 135 S. E., 451; *S. v. Davenport,* 156 N. C., 596, 72 S. E., 7; *S. v. Lawson,* 123 N. C., 740; *S. v. Hinson,* 83 N. C., 640.

Where there is such a show of force as to create a reasonable apprehension in the mind of the one in possession of premises that he must yield to avoid a breach of the peace, and he does so yield, this is a yielding upon force, and constitutes forceable trespass. *S. v. Pollok,* 26 N. C., 305; *S. v. Oxendine,* 187 N. C., 658, 122 S. E., 568.

The position is further supported by the decision in *Somers v. Credit Co.,* 201 N. C., 601, 160 S. E., 829.

The plaintiff's evidence was such as to carry the case to the jury. It is true, the defendant's agents testified to a contrary state of facts, but this was for the twelve.

Reversed.

CARRIE MERRITT, ADMINISTRATRIX, v. TIDE WATER POWER COMPANY.

(Filed 11 October, 1933.)

Electricity A a—Power company under no duty to maintain or repair equipment may not be held liable for damages resulting therefrom.

In an action to recover for the wrongful death of plaintiff's intestate, who was burned to death in a fire occurring while intestate was a prisoner in a municipal stockade which was furnished with electricity by defendant, plaintiff may not recover even though it be conceded that the fire resulting in intestate's death was caused by a defect in the electrical equipment where all the evidence tends to show that defendant power company was under no duty to maintain or inspect the equipment.

APPEAL by plaintiff from *Moore, Special Judge,* at March Term, 1932, of WAYNE.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

In 1929, Duplin County built a stockade which was equipped with electric lights. The defendant installed the lighting fixtures, wiring and equipment and furnished the current for the lighting system.

On the night of 6 March, 1931, plaintiff's intestate was burned to death while incarcerated in said stockade as a prisoner. It is alleged that the fire originated from a short circuit or some defect in the lighting system installed by the defendant.

It is further alleged in the complaint that "the defendant agreed to install and maintain the said lighting fixtures and equipment and to exercise supervision over it; that by these means, the defendant was to sell and to deliver to the county of Duplin, for use at its stockade, at retail, electrical power and electrical current; and that this contract was in force and existing on 6 March, 1931."

It is in evidence that the defendant did install the electrical equipment in said stockade and repaired the same from time to time as repairs were needed at the request of official in charge of the stockade, but that said equipment was not maintained by the defendant in the sense that it owed the duty of inspection or supervision.

From a judgment of nonsuit entered at the close of plaintiff's evidence, she appeals.

J. Faison Thomson, Hugh Brown Campbell, Kenneth C. Royall, N. W. Outlaw and Rivers D. Johnson for plaintiff.

L. J. Poisson, Langston, Allen & Taylor and Stevens, Beasley & Stevens for defendant.

STACY, C. J. Conceding, without deciding, the evidence is sufficient to warrant the inference that the fire originated from some defect in the electrical equipment (*Turner v. Power Co.,* 154 N. C., 131, 69 S. E., 767, 32 L. R. A. (N. S.), 848; 9 R. C. L., 1196), nevertheless it also establishes the fact, contrary to the allegations of the complaint, that the defendant was under no duty to inspect or to maintain the lighting equipment in the stockade in a safe condition. *Small v. Utilities Co.,* 200 N. C., 719, 158 S. E., 385; 9 R. C. L., 1204. This differentiates the case from *Collins v. Electric Co.,* 204 N. C., 320, 168 S. E., 500, cited and strongly relied upon by the plaintiff.

The action was properly dismissed as in case of nonsuit.

Affirmed.

E. K. SANDERSON ET AL. v. EVELYN W. SANDERSON.

(Filed 11 October, 1933.)

Deeds and Conveyances C f—Life tenant in this deed held liable for one-half costs of upkeep unaffected by other tenant's reconveyance.

Plaintiffs conveyed the land in question to E. S. for the term of her life and to J. S. for the term of his life, the grantees in the deed agreeing to pay taxes levied against the property and to keep the premises insured and repaired, the deed providing for reversion to the grantors upon breach of the agreement, and that E. S. should have all rents and profits from the land not actually occupied by the grantees. J. S. then conveyed his interests in the property back to the grantors: *Held,* the grantors were estopped by their original deed from claiming any of the rents and profits from the property not actually occupied by the grantees and from denying that both the grantees were to pay the taxes and keep the property insured and in repair, and in their action to have the life estate of E. S. declared forfeited for breach of the agreement, E. S. was entitled to a judgment in her favor upon a showing that she had paid half the taxes and the cost of insurance and repairs, and to a judgment that she recover the amount paid by her for repairs and insurance above one-half the cost thereof.

APPEAL by plaintiffs from *Frizzelle, J.,* at April Term, 1933, of JOHNSTON.

Civil action to declare forfeiture of estate in lands for breach of covenant and to remove deed as cloud on plaintiffs' title.

On 7 March, 1930, the plaintiffs by warranty deed conveyed "to the said Evelyn W. Sanderson, for and during the term of her natural life, and to the said J. H. Sanderson, for and during the term of his natural life, all that certain piece or parcel of land situate in Johnston County" (describing it). This same language is repeated in the habendum clause.

Said deed contains the following stipulation: "It is understood and agreed between the parties of the first part and the parties of the second part that the grantees herein, Evelyn W. Sanderson and J. H. Sanderson, shall keep the buildings upon said premises insured in some reliable insurance company, having an agency in Johnston County, at their insurable value, and shall also pay all taxes and assessments levied against said property as they become due and payable and shall also keep up all ordinary and necessary repairs of said buildings and any failure upon the part of the grantees herein to keep said buildings insured, the taxes and assessments paid, and necessary repairs made, shall work a forfeiture of the life estate herein granted, and said property shall thereupon revert to the grantors and their heirs and assigns; and it is further agreed by and between the parties to this instrument that the rents and profits from said property herein conveyed, not actually occupied by the grantees, shall be paid to the said Evelyn W. Sanderson during her lifetime."

On the following day, 8 March, 1930, J. H. Sanderson reconveyed "all his right, title, interest and life estate" in said land back to the plaintiffs.

Plaintiffs allege that the defendant has failed to pay the taxes on said land, to keep the buildings insured, and to make necessary repairs; wherefore they ask a forfeiture of her interest therein under the provisions of the deed above mentioned.

A jury trial was waived and the court found that the defendant had paid her part of the taxes, $33.24 for insurance and $50.47 for repairs, and rendered judgment for defendant, not only that she hold the land under her deed, but also that she recover from the plaintiffs one-half of the amount expended by her for insurance and repairs. This upon the theory that plaintiffs were liable for one-half the taxes, insurance and repairs under the deed from J. H. Sanderson reconveying his interest in the land back to the plaintiffs.

Plaintiffs appeal, assigning errors.

Hugh Pace, E. J. Wellons and Abell & Shepard for plaintiffs.
Parker & Lee and Wellons & Wellons for defendant.

STACY, C. J. The judgment of the Superior Court is predicated upon the theory that the deed from the plaintiffs to Evelyn W. Sanderson and J. H. Sanderson created a joint tenancy for life, with right of survivorship (*Burton v. Cahill,* 192 N. C., 505, 135 S. E., 332), which was converted into a tenancy in common between plaintiffs and defendant by the deed of J. H. Sanderson reconveying "all his right, title, interest and life estate" to plaintiffs. 33 C. J., 914.

But it is contended by the plaintiffs that the life estate of J. H. Sanderson, when reconveyed to the plaintiffs, was swallowed up or merged in the reversion already held by them (10 R. C. L., 667; 21 C. J., 1033); and that, therefore, not only was there a severance of the joint tenancy by the J. H. Sanderson deed of reconveyance but an avoidance of a tenancy in common as well. But the plaintiffs are estopped by their original deed from claiming any part of the rents or profits of the property, not actually occupied by the grantees, during the lifetime of Evelyn W. Sanderson, and from denying that both grantees, "Evelyn W. Sanderson and J. H. Sanderson" were to keep the buildings insured and in repair and pay taxes and assessments levied against said property as they became due and payable. *Willis v. Willis,* 203 N. C., 517, 166 S. E., 398.

Affirmed.

TOWN OF WILSON v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 11 October, 1933.)

Removal of Causes C b—Allegation of conspiracy between individual defendants held not to affect corporate defendants' right to removal.

This action was brought against the clerk and assistant city clerk and cashier of a city to recover for misappropriation of city funds and conspiracy to defraud the city out of moneys collected under color of their offices and misappropriated or embezzled, and against the nonresident corporate sureties on their official bonds. The corporate defendants moved for a removal of the causes to the Federal Court, their petitions for removal showing the requisite jurisdictional amounts and asserting rights of removal on the ground of diverse citizenship and separable controversies: *Held,* the petitions for removal should have been granted, the allegations of the complaint as to conspiracy between the individual defendants not affecting the liability of the corporate defendants on the bonds, or the question of separability.

APPEAL by defendants from *Daniels, J.,* at June Term, 1933, of WILSON.

Civil action to recover of T. A. Hinnant, city clerk, and surety on his official bond, Fidelity and Deposit Company of Maryland, and Glaucus G. Hinnant, assistant city clerk, and surety on his official bond, Fidelity and Casualty Company of New York, and Mary Beatrice Boger, cashier of the town of Wilson, and surety on her official bond, Fidelity and Casualty Company of New York, for alleged misappropriations of public funds, and conspiracy to defraud the plaintiff out of moneys collected by the defendants under color of their offices and fraudulently misapplied or embezzled. The individual defendants are residents of the State of North Carolina. The corporate defendants are corporations chartered under the laws of Maryland and New York.

Motions by nonresident corporate defendants to remove cause to the District Court of the United States for the Eastern District of North Carolina for trial. Motions denied by the clerk and affirmed on appeal by the judge of the Superior Court, from which ruling movants appeal.

Connor & Hill and Manning & Manning for plaintiff.

Finch, Rand & Finch and S. Brown Shepherd for defendant, Fidelity and Deposit Company of Maryland.

Ruark & Ruark for defendant, Fidelity and Casualty Company of New York.

STACY, C. J. The petitions for removal, besides showing requisite jurisdictional amounts, assert rights of removal on grounds of diverse citizenship and separable controversies. *Brown v. R. R.*, 204 N. C., 25.

The liabilities of the corporate defendants are predicated upon three separate bonds, one executed by the Fidelity and Deposit Company of Maryland to protect the plaintiff against larceny or embezzlement of the town clerk, and the others executed by Fidelity and Casualty Company of New York to insure the faithful performance of duties and accounting on the part of the assistant clerk and cashier.

It is practically conceded that under the decision in *Timber Co. v. Ins. Co.*, 190 N. C., 801, 130 S. E., 864, the motions should have been allowed, unless the allegation of a conspiracy among the individual defendants defeats the rights of removal on grounds of separable controversies. We fail to see wherein this allegation changes the liability of the corporate defendants on their respective bonds, or affects the question of separability, upon which the rights of removal depend.

Reversed.

S. SCOTT FEREBEE v. E. B. THOMASON AND L. O. LOHMANN, TRUSTEES, AND R. G. KITTRELL, SUBSTITUTED TRUSTEE.

(Filed 11 October, 1933.)

1. **Mortgages H b—Continuance of order restraining foreclosure affirmed in this case under general rule for continuance of temporary orders.**

Under the facts set forth in this action and appearing from the pleadings the judgment of the lower court continuing an order restraining defendant from foreclosing the deed of trust to the final hearing is affirmed, the general rule being that a temporary order will be continued to the hearing where serious controversy exists and continuance will not harm defendant and dissolution might cause great injury to plaintiff.

2. Parties B a—

Where the court has continued a temporary order restraining the trustee from foreclosing a deed of trust to the final hearing, his order for the joinder of the *cestuis que trustent* as parties defendant is not error.

APPEAL by defendant R. G. Kittrell, substituted trustee, from *Daniels, J.*, at Chambers, 6 February, 1933. From VANCE. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard before his Honor, F. A. Daniels, upon motion of R. G. Kittrell, substituted trustee, to dissolve the restraining order, and after due consideration, and the argument of counsel, the court is of the opinion that the restraining order be continued to the hearing.

It is further ordered as a condition precedent that the plaintiff pay into the office of the clerk of the Superior Court the sum of $40.00 per month from 1 February, 1933, as rent of the property, on the 10th of each month. It is ordered that this case be set for trial on Tuesday, 14 March, 1933, of Vance Superior Court.

At Halifax, N. C., 6 February, 1933. F. A. Daniels, judge, etc.

It appearing to the court that the First and Merchants National Bank of Richmond, Va., and Home Mortgage Corporation or its successors are necessary parties, it is ordered that said parties be made parties defendant in the manner provided by law. F. A. DANIELS, *Judge.*"

The defendant made the following exceptions and assignments of error and appealed to the Supreme Court:

"1. Defendant R. G. Kittrell, substituted trustee, excepts to the refusal of the court to dissolve the restraining order.

2. R. G. Kittrell, substituted trustee, excepts to the order of the court continuing the restraining order to hearing.

3. R. G. Kittrell, substituted trustee, excepts to the order of the court making the First and Merchants National Bank of Richmond, Va., and Home Mortgage Corporation or its successors parties to the above proceeding.

4. R. G. Kittrell, substituted trustee, excepts to the judgment as rendered.

5. R. G. Kittrell, substituted trustee, excepts to the signing of said judgment by the court."

J. H. Bridgers, Jasper B. Hicks and A. A. Bunn for plaintiff.
Perry & Kittrell for defendants.

PER CURIAM. The questions involved: (1) Did the court err in preserving the *status quo* upon the facts set forth in this action and appearing from the pleadings? (2) Did the court err in making the Home Mortgage Corporation and First and Merchants National Bank of Richmond, Va., parties defendant, where it appeared upon the record that they claimed to be beneficiaries under the deed of trust sought to be foreclosed? We think both questions must be answered in the negative.

In *Holder v. Mortgage Co., ante,* 207 (208), speaking to the subject, we find: "Injunctions generally will continue, where it will not harm defendant and may cause great injury to plaintiff, if dissolved. *Wentz v. Land Co.,* 193 N. C., 32; *Brinkley v. Norman,* 190 N. C., 851; *Cullins v. State College,* 198 N. C., 337. Temporary restraining order will be continued until hearing, where serious controversy exists, and continuance cannot harm defendant, while dissolving might injure plaintiff, *Brown v. Aydlett,* 193 N. C., 832."

There was no error in the court below making the *cestuis que trustent* parties to the action. This matter was decided in *Bank v. Thomas,* 204 N. C., 599. The judgment of the court below is

Affirmed.

P. B. CARR AND S. H. CARR, TRADING AS CARR BROTHERS, v. J. FRANK CLARK AND EVA EMMA CLARK, HIS WIFE.

(Filed 11 October, 1933.)

Bills and Notes C c—Party endorsing note and guaranteeing payment may not show different liability by parol.

Defendants, husband and wife, being indebted to plaintiff, endorsed a note in which the wife was payee over to the plaintiff, the endorsement being a guarantee of payment and stating that it was signed with full knowledge of the contract. The note was not paid in full, and plaintiff instituted action to recover the balance due. The male defendant was allowed to testify that he had transferred the note over to plaintiff in full settlement of the debt: *Held,* the evidence was incompetent as being in contradiction of the terms of a written instrument, C. S., 3044, and plaintiff is entitled to a new trial on his exception to the court's charge to the jury based upon such evidence.

APPEAL by plaintiff from *Hill, Special Judge,* at July Term, 1933, of AVERY. New trial.

Watson & Fouts for plaintiffs.
Charles Hughes and Burke & Burke for defendants.

ADAMS, J. It is alleged in the complaint that in the year 1931 the defendants became indebted to the plaintiffs for building material and are now due them $331.89 with interest thereon from 18 April, 1932. Harrison Houston had previously executed to the defendant Eva Emma Clark a promissory note in the sum of $875 which was secured by a deed of trust on real estate in Washington County, Tennessee. The defendants endorsed the note, delivered it to the plaintiffs, and requested that it be applied to their indebtedness. Certain payments were made and thereafter upon default the property was sold at the price of $400. This amount was credited on the note and, according to the allegations in the complaint, the remainder now due on the note is $331.89, the amount for the recovery of which the present action is prosecuted.

The following endorsement on the back of the notes was signed by the defendants: "We, as endorsers, waive demand, notice, and protest, and guarantee payment of this note, and acknowledge that we sign with full knowledge of this contract."

Subject to the plaintiff's exception, J. Frank Clark, one of the defendants, was permitted to testify that he was not indebted to the plaintiff in any amount and that by agreement with the plaintiffs "I just merely endorsed a note over from myself to them, transferred the title to them, in payment of the $800 on lumber."

This testimony is in direct contradiction of the written agreement as expressed in the endorsement to "guarantee payment of this note . . . with full knowledge of this contract," and for this reason it should have been excluded. C. S., 3044; *Kindler v. Trust Co.,* 204 N. C., 198; *Miller v. Farmers Federation,* 192 N. C., 144; *Lumber Co. v. Sturgill,* 190 N. C., 776. The competency of parol evidence in case of a blank endorsement is adverted to in *Sykes v. Everett,* 167 N. C., 600, and *Bank v. Wilson,* 168 N. C., 557.

We find nothing in the alleged contemporaneous contract that requires or reasonably permits a relaxation of the principle which denies the right to vary or contradict a written contract by parol evidence. The instruction excepted to is based upon the admission of incompetent testimony and for this reason is not in accord with the authorities.

New trial.

CASSANDRA HYMAN v. ELLA JONES ET AL.

(Filed 11 October, 1933.)

Limitation of Actions A d: C e—Execution on decree for owelty is barred in ten years and bar is unaffected by incompleted execution.

The issuing of execution on a decree charging owelty in partition is barred by the ten-year statute of limitations, the lien upon lands of a docketed judgment being barred after the lapse of ten years from the

date of docketing, and the bar of the statute is unaffected by the beginning of an execution which is not completed by sale prior to the expiration of the ten years, an execution adding nothing to the life of the lien of the judgment.

APPEAL by defendants from *Moore, Special Judge,* at April Term, 1933, of MARTIN.

Civil action to restrain sale under execution issued on judgment for owelty on the ground that the lien of said judgment had been lost by the lapse of time and that sale thereunder was barred by the ten-year statute of limitations.

In the actual division of the lands of the late Ishmael Hyman, Lot No. 2, allotted to Z. H. Hyman, was charged with an owelty of partition in the sum of $700 in favor of Ella Jones. Judgment of confirmation entered 31 January, 1923. Execution was issued on this judgment 16 January, 1933, levy duly made prior to 31 January, 1933, and the land was advertised for sale on 6 March, 1933. Plaintiff, who acquired the interest of Z. H. Hyman in said lot at foreclosure sale in 1931, enjoined the sale on the ground that the lien of said owelty judgment was unenforceable after the lapse of ten years.

From a judgment for plaintiff, the defendants appeal.

B. A. Critcher for plaintiff.
Jos. W. Bailey for defendants.

STACY, C. J. It is settled by the decision in *Smith ex parte,* 134 N. C., 495, 47 S. E., 16, that the issuing of an execution on a decree charging owelty in partition is barred by the ten-year statute of limitations. See, also, *Newsome v. Harrell,* 168 N. C., 295, 84 S. E., 337, and *Cochran v. Colson,* 192 N. C., 663, 135 S. E., 794.

It is likewise settled by a number of decisions, notably *Lytle v. Lytle,* 94 N. C., 683, *Lyon v. Russ,* 84 N. C., 588, and *Pasour v. Rhyne,* 82 N. C., 149, that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien.

The judgment, therefore, in the instant case is accordant with the decisions.

Affirmed.

L. J. LAWRENCE, GUARDIAN OF HARRY NEWSOME, v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 11 October, 1933.)

Banks and Banking H e—Under facts of this case depositor held entitled to preferred claim against assets of insolvent bank.

A depositor in a bank agreed to keep the deposit intact so long as the bank loaned a like sum to a third person, the bank having the right to call the loan to the third person if the deposit was withdrawn, and the depositor having the right to withdraw the deposit if the bank should call the loan: *Held*, upon the insolvency of the bank, the depositor was entitled to a preferred claim under the authority of *Flack v. Hood, Comr.*, 204 N. C., 337.

APPEAL by defendant from *Daniels, J.*, at April Term, 1933, of HERTFORD. Affirmed.

W. D. Boone and Lloyd J. Lawrence in propria persona.
J. A. Pritchett for defendant.

CLARKSON, J. The question of law involved is as follows: Where, for the purpose of furthering a transaction between a depositor and a third person, a deposit is made in a solvent State bank which operates no trust department, under an agreement between the depositor and the bank, that simultaneously with the making of the deposit, the bank is to make a specific loan to such third person, accept from such third person a specific note secured by a specific deed of trust, upon condition that the said deposit should be kept intact, and the depositor to carry said deposit in said bank so long as said bank should carry said loan, with the right in the bank to call said loan whenever such deposit should be withdrawn and with the right in the depositor to withdraw such deposit or funds whenever the bank should call the loan, is such deposit a preferred claim against the assets of said bank upon its subsequent insolvency and the calling of said loan? We think so.

We have written much recently on the question of what is and what is not a preferred claim against the assets of an insolvent bank. We will not repeat. We think that under the facts and circumstances of this case it is controlled by the principle stated in *Flack v. Hood, Comr.*, 204 N. C., 337, and *Smith v. Hood, Comr.*, 204 N. C., 343. The judgment of the court below is

Affirmed.

PHILLIP KELLER v. SOUTHERN RAILWAY COMPANY AND W. T. DAVIS, ADMINISTRATOR OF THE ESTATE OF A. J. KELLER, DECEASED, v. SOUTHERN RAILWAY COMPANY.

(Filed 11 October, 1933.)

1. **Trial D a—On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff.**

   On a motion as of nonsuit all the evidence, whether offered by plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Railroads D b—Whether motorist's failure to stop at crossing was contributory negligence held for jury under evidence in this case.**

   A driver of an automobile is not required under all circumstances to stop before driving upon a railroad grade crossing, and whether he is required to do so under the particular circumstances disclosed by the evidence is ordinarily a mixed question of law and fact to be submitted to the jury upon proper instruction from the court, and in this case, under evidence tending to show that by reason of a defective hood on an automatic electric signal at a much used crossing the green signal with the word "go" was lighted by the rays of the sun, the question of whether the driver was guilty of contributory negligence in failing to stop was properly submitted to the jury under the rule of that degree of care that an ordinarily prudent man would have observed for his own safety under the circumstances, the fact that the green signal was lighted being an assurance of safety to the driver. N. C. Code, 1931, sec. 2621(47).

3. **Automobile C j—Negligence of driver may not be imputed to guest where guest has no control or management of car.**

   In an action by an administrator of a guest killed in a collision between the automobile in which he was riding and defendant's railroad train at a public crossing, the issue of contributory negligence, tendered on the theory that the driver's negligence was imputed to the guest, is properly refused where the evidence discloses that the car was being driven independently by the owner and that the guest had no control over its operation.

4. **Appeal and Error J c—Exception to admission of evidence will not be sustained where objecting party elicits evidence of same import.**

   In this action for damages brought against a railroad company for the negligent killing of plaintiff's intestate at a public crossing by reason of a defective automatic electrical signal, an exception to the admission of evidence as to the condition of a signal at another such crossing is not sustained, it appearing that defendant had brought out similar evidence upon cross-examination.

BROGDEN, J., dissenting.

APPEAL by defendant from *Clement, J.*, and a jury, at October Term, 1932, of MADISON. No error.

The complaint of plaintiff in Keller *v.* Railway Co., is as follows:

"For a first cause of action, the plaintiff, complaining of the defendant, says:

1. That the defendant is a corporation created and existing under the laws of the State of Virginia, and as such is authorized to do business in the county and state aforesaid as a common carrier of freight and passengers for hire.

2. That plaintiff is a citizen and resident of the county of Madison, State of North Carolina.

3. That at the time hereinafter mentioned the defendant as such daily operated approximately twenty-five trains over its track laid through the town of Hot Springs.

4. That defendant's said track runs east and west alongside the main street of said town and close to and on the south side of defendant's depot, which depot is located in the very heart of the business section of said town.

5. That a public highway leading from North Carolina into Tennessee and the west crosses defendant's said track in a southward direction from the French Broad River, and is flanked immediately on the west by the defendant's depot, and immediately on the east by defendant's building known as the supervisor's house, both the said depot and supervisor's house being on the north side of defendant's track, and so close thereto as to barely admit of the passage of defendant's train; that the public highway is very narrow and passes between said depot and supervisor's house immediately before one crosses said tracks traveling south on said highway.

6. That the defendant's track from the east end of said depot westwardly is so completely hidden from view by said depot and by trees and shrubbery that at no time in approaching said crossing and traveling upon said highway from said river can the driver of an automobile see said track to the west of the east end of said depot, or see trains approaching said crossing from a westerly direction until after his automobile enters upon defendant's track at said crossing.

7. That owing to the obstruction of one's view by said depot, supervisor's house, trees and shrubbery, the said crossing to one traveling south is a blind and dangerous crossing.

8. That the town of Hot Springs numbers many hundred of inhabitants and is a trade center for the entire surrounding country, while said highway not only carries the local pedestrian and vehicular traffic of a populous community, but is also the main artery of travel from Tennessee and all points west, and as a consequence many hundreds of pedestrians and automobiles are constantly crossing the defendant's track at said crossing, and defendant operates daily over its said track

approximately twenty-five trains—all of which was and is well known to defendant, and rendered it imperative that defendant in the exercise of ordinary care use great precaution to prevent injury to persons crossing its said track at said crossing.

9. That there are in common and general use by defendant and all other railways for the protection of persons crossing railway tracks at such dangerous crossing, gates with watchmen, or gongs to warn persons of the approach of trains; yet the defendant negligently and carelessly failed to provide either gongs or gates with watchmen at said crossing, when the defendant knew or should have known that such precautions were reasonably necessary to protect the traveling public against injury at said blind crossing.

10. That although defendant's own buildings obstructed and rendered said crossing extremely hazardous and dangerous to the hundreds of pedestrians and automobiles daily passing over the same, the defendant negligently and carelessly failed to provide gates and watchmen, or gongs thereat to warn such pedestrians and automobiles of the approach of the defendant's numerous trains daily passing over defendant's said track and crossing, and instead installed and maintained at said crossing a red and green light electrical signaling system, which system was defective, dangerous, unsafe, misleading, and made of said crossing a veritable death trap in that:

First: The red and green lights on the north side of said track were defectively hooded and placed so as to admit and cause the sun's ray to shine directly against the glass of said signals, and thus to render it difficult to ascertain whether the signals were showing 'red' or 'green.'

Second: The hood and lighting device of said red and green signals were defective in that they did not darken the red glass when the green was showing and *vice versa.*

Third: The mechanism of said signaling system was negligently permitted by defendant to become and remain out of repair, defective and dangerous for a long time immediately prior to, as well as at the time of the injuries hereinafter mentioned, so that at said times the green signal showed 'green' at all times when defendant's trains were approaching and traversing said crossing, instead of showing 'red' when trains were approaching said crossing, as would have been the case had said system and the mechanism thereof been in good repair and working order.

11. That defendant also negligently and carelessly failed to properly inspect and supervise said signaling system so as to keep the same in repair and good working order at all times, because it knew, or should have known, that its failure so to do would likely result in injury to persons and automobiles upon said crossing.

12. That on 3 May, 1932, the plaintiff, driving his truck southward along said public highway, approached said crossing in a lawful and cautious manner, looking and listening and carefully observing the signal light on the north side of defendant's track and perceiving the same to be showing 'green' which indicated that no trains were approaching, and hearing no warning signal by any bell, whistle or otherwise by any train, entered upon said track, when one of defendant's trains proceeding from a westerly direction at a high, negligent, reckless, dangerous and terrific rate of speed dashed against plaintiff's automobile hurling the same violently against the iron signal post on the south side of said track, completely demolishing plaintiff's truck and killing plaintiff's father and one Terrell Ricker, who were also occupants of said truck, and seriously and permanently injuring plaintiff, as will hereinafter more fully appear.

13. That the plaintiff was actively induced by said defendant's 'green' signal to drive upon its track at said crossing, and was prevented from seeing said approaching train by reason of said trees, shrubbery and defendant's said buildings negligently maintained by defendant so as to obstruct one's view in approaching from said river and entering upon defendant's track.

14. That defendant's engineer, fireman, and other agents, servants and vice-principals in charge of and operating said train at the time of striking plaintiff's truck not only negligently operated the same at said high rate of speed, and without sounding any bell, whistle, or other signal at any time upon approaching said crossing, but also negligently failed to keep a proper lookout ahead, and to so operate said train as to control, promptly slacken the speed of, or to stop same in case of an emergency.

15. That had defendant's said agents, servants and vice-principals operated said train at a reasonable rate of speed, and have had same under proper control, and have kept a proper lookout ahead they could and should have stopped, or at least have slackened the speed thereof, after plaintiff was induced to enter upon said track as aforesaid, so as to have averted demolishing said truck and injuring the plaintiff and other occupants thereof.

16. That plaintiff's truck was struck by defendant's train by reason of defendant's and defendant's agents' said acts of negligence, and as a consequence thereof plaintiff received serious and permanent lacerations, contusions, disfigurements and injuries to his face, head, scalp, neck, shoulders, body, limbs, spine, internal organs and nervous system, lost large quantities of blood, was committed to a hospital where his wounds were stitched and where for many days he underwent painful treatment of his said injuries, was compelled to incur much expense in the treat-

ment of said injuries, and for doctor's bills, medicines, and hospital treatment, was left permanently sick, sore and disordered, has lost much time from his work, and is seriously and permanently incapacitated therefor, and has suffered and will continue to suffer great mental anguish and physical pain, all to his damage in the sum of $2,650.

And for a second cause of action, plaintiff says:

1. That plaintiff is a citizen and resident of said county and State.

2. That defendant is a corporation under the laws of the State of Virginia.

3. That the plaintiff adopts and incorporates as a part of this cause of action each and every allegation of the first cause of action, except paragraph No. 16.

4. That on 3 May, 1932, the plaintiff, after looking and listening and hearing no signals by any approaching train, nor seeing any train, and observing that defendant's electric light signaling system at the public highway crossing at its depot in the heart of the business section of the town of Hot Springs, county and State aforesaid, was showing 'green' (which is the signal to go) and being induced by said factors to do so, entered upon defendant's track at said crossing and was in the act of crossing the same going southward when one of the defendant's trains, being operated at a high, negligent, dangerous and unlawful rate of speed by the defendant's agents and servants in charge thereat, and having sounded no signal of any kind to warn plaintiff, driving against plaintiff's said truck from the west, striking the same a terrific blow and completely demolishing, damaging and destroying said truck.

5. That plaintiff was prevented from seeing said approaching train by reason of defendant's track being obstructed by trees and shrubbery, and by defendant's buildings negligently constructed close to and maintained on either side of said highway at said crossing, although defendant knew that about twenty-five of its trains daily passed over said crossing, and also that same was daily used by hundreds of pedestrians and automobilists.

6. That defendant's signaling system was defective, dangerous, unsafe and misleading, as set out in paragraph 10 of the plaintiff's first cause of action.

7. That had defendant's agents and vice-principals operated its said train at a reasonable rate of speed, have given timely signals, and kept a proper lookout ahead, they could have discovered plaintiff's perilous position on said track and could have stopped or slackened the speed of said train and thus have averted the destruction of the plaintiff's said truck, but instead negligently failed to do so.

8. That plaintiff's said truck was destroyed by defendant's said negligence and was of the reasonable market value of $350.00.

Wherefore, plaintiff prays judgment under his first cause of action for the sum of $2,650, and under his second cause of action for $350.00, and for the costs of the actions to be taxed by the clerk.

In answer, the defendant denied the material allegations of the complaint, set up the plea of contributory negligence, and further set up a violation of N. C. Code, 1931 (Michie, sec. 2621(47)—(railroad warning signals must be observed) "was the direct and sole proximate cause of any injury he (plaintiff) sustained, and said conduct is specifically pleaded in bar of plaintiff's right to recover herein."

The defendant further says "That at the time of said accident said lights were in perfect condition and that as the plaintiff approached said crossing said signal light was red, which was a warning to him that said train would immediately go over the said crossing."

These matters were set up in bar of recovery.

In the companion case of Davis, Admr., *v.* Railway Co., the complaint and answer involved the same feature of complaint and defense, except that plaintiff alleges that "the plaintiff's intestate was an occupant or passenger of a truck being driven southward along said public highway in the direction of said crossing; that plaintiff's intestate had no control or authority over said driver or said truck," etc.

In answer defendant says: "That if the plaintiff's intestate was injured and killed, it was due:

(a) To the result of his own negligence and the negligence of his agent, companion and joint adventurer in going upon the track of the defendant in the face of the approaching train, without exercising a proper lookout and due care for his own safety.

(b) To his contributory negligence in failing to stop, look and listen for the approaching train, which was in full view until he went upon the tracks of the defendant, and in that his agent, companion and joint adventurer failed to stop, look and listen for the approaching train, and plaintiff's intestate recklessly, heedlessly and negligently allowed, permitted and acquiesced in his companion and joint adventurer, to wit, Phillip Keller, driving said automobile upon said railroad tracks, and said negligence of plaintiff's intestate and his agent and joint adventurer contributed to and proximately caused the injury and death of plaintiff's intestate, and such contributory negligence is hereby pleaded as a bar to any recovery in this action.

(c) To his contributory negligence proximately causing his injury and death in that he rode in said motor vehicle willingly and concurred or acquiesced in the reckless driving of the same by his companion.

That the driver of said automobile, Phillip Keller, was a reckless, dangerous and indifferent driver of automobiles and trucks; that plaintiff's intestate was in the habit of riding with his said son, Phillip

Keller, and knew and appreciated the fact that the said Phillip Keller was a reckless, dangerous and indifferent driver, and notwithstanding such knowledge on his part plaintiff's intestate on this occasion rode with the said driver, realizing at the time that to do so was dangerous, and that said driver was likely, through his negligence, to cause a serious accident at any time."

The issues submitted to the jury and their answers thereto, in the first and second cause of action, were as follows:

(1) Was the plaintiff, Phillip Keller, injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff, Phillip Keller, by his own negligence contribute to the injury he sustained as alleged in the complaint? Answer: No.

(3) What damage, if any, is the plaintiff, Phillip Keller, entitled to recover of the defendant for injuries done to his person? Answer: $1,225.

(4) What damage, if any, is the plaintiff Phillip Keller, entitled to recover for damages done to his truck? Answer: $156.25."

The issues submitted to the jury and their answers thereto, in the second action, were as follows:

(1) Was A. J. Keller, deceased, killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

(2) What damage, if any, is W. T. Davis, administrator of A. J. Keller, entitled to recover of the defendant, Southern Railway Company? Answer: $750.00.

The court below rendered judgments on the verdicts. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

George M. Pritchard and James E. Rector for plaintiffs.
R. C. Kelly and Jones & Ward for defendant.

CLARKSON, J. These are actions for actionable negligence alleging damages. The plaintiff, Phillip Keller, instituted this action in the Superior Court of Madison County, against the Southern Railway Company, on 19 July, 1932, and filed his complaint, alleging two causes of action. In his first cause of action he alleges that he was operating an automobile truck and drove upon the track of the defendant, Southern Railway Company, in the town of Hot Springs, and was struck and injured, and demands judgment in the sum of $2,650. In his second cause of action he alleges that his truck was demolished by reason of the impact set forth in his first cause of action, and that he sustained damages in the sum of $350.00 to his truck.

On the same date W. T. Davis, administrator of the estate of A. J. Keller, deceased, instituted an action in the Superior Court of Madison County against the Southern Railway Company, and filed his complaint on said date, alleging that A. J. Keller, an old man 75 years of age, was a passenger in the automobile driven by Phillip Keller, the owner of the truck, and that plaintiff's intestate was killed in said collision, and judgment was demanded in the sum of $3,000.

In both actions, all the issues were found in favor of the plaintiffs, and judgments rendered on the verdicts in favor of the plaintiffs.

At the close of plaintiffs' evidence and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error. It is a well settled rule that upon a motion as of nonsuit the evidence, whether offered by the plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference to be drawn therefrom. We set forth the complaint in full, without going into a lengthy detail of the evidence, as we think the evidence on the material allegations in the complaint sufficient to have been submitted to the jury. There is a discrepancy between the complaint and evidence as to the course of the highway and railroad. In the opinion we will treat the highway as running east and west and railroad north and south. Phillip Keller, the plaintiff, lived about 3 miles from Hot Springs, N. C., and on the morning of 3 May, 1932, between 7 and 8 o'clock, was on his way to Greenville, Tenn., driving a 1930 "A" model Ford truck. It had been a coupe and had been changed into a light delivery truck, which he ordinarily used for hauling wood. He was at the wheel, and next to him was his father, A. J. Keller, and sitting next to his father was Terrell Ricker. He was driving west through Hot Springs on a hard-surfaced State highway, "the main artery east and west." The village had a population (1930 census) of 725.

The defendant's railroad track, which runs north and south, crosses this highway. Each day 100 to 500 cars and 400 to 500 pedestrians cross the defendant's track on this highway. On each side of the track defendant has a signal post with a red warning light, with the word "Stop" and a green light with the word "Go." Defendant ran about 25 trains over this track a day. Approaching the defendant's track, going west, the highway goes up a slight incline until it reaches the defendant's track, and it is level and then a decline downward. The view of a traveler on the highway going west is obstructed by defendant's depot, trees and shrubbery, in seeing a train going north on defendant's track, until very near the track.

Plaintiff testified, in part: "I was going west, going to Tennessee, as I drove towards the track; the light was green, it said "Go" and I drove upon the track slowly, was making 6 or 8 miles an hour. I was on the mountain side, the right-hand side of the highway, and just as we got up there, we were going on the track, and the train came up at a rapid speed, must have been making about 30 miles an hour; it hit us and knocked us over against the signal post. . . . That crossing is right there at the main public square of the town, and as I was going up to the crossing to cross the crossing there you go between buildings, on both sides it is a close space. I was going towards Tennessee; you can't see a train coming until you are right on the track. . . . It may be 16 feet from the railroad back to the depot. . . . The shrubbery keeps you blinded from seeing the train until you get to the depot, and that garage and you can't see at all until you enter right on the track. . . . Just shrubbery and trees. . . . In the complaint, I alleged, 'that the green light, as I came to the track, with a defective hood, so as to cause the sun's rays to shine against the glass of the said signal rendered it difficult to tell whether the signal was showing red or green.' . . . I know I drove up there and the light showed to be green, looked green to me; well, it was a green light. I could tell them apart that morning and the light showed green. It was not hard to tell whether it was a green or a red light that morning when I drove up there. . . . I know the green light was the only one I could see that was burning bright at that time. . . . The light shined against both and showed against them both and that was because they were poorly hooded, and that is true, and when I told him the sun was shining against those two lights, making it hard to tell which was the green or red, I told him the truth, and I told him that was the condition the day I went on there, on the morning I drove up there the light did show green then. . . . You could always see both lights if the sun was shining, but the green light showed plain that morning. The red light when you see 'stop' that says stop, and if 'go' it is on the green light, you drive on, and I saw 'go' on the green light and drove on. . . . I cut the gas off and it rolled up on the track. I got the four wheels on the track and saw the train coming and I then socked the gas on it; when I saw the train I was going about from 4 to 8 miles; it had just been a short distance behind that I cut the gas off, I cut the gas off about 25 or 30 feet back of that, but I was driving slow coming up there. . . . I put the gas to it to get across and, it hit the back end; from the time I saw the train 30 feet from me, until it hit me, I went about half the distance of the car, and my car was 8 to 10 feet. I will say I drove 8 feet, while the train drove 20, but I saw it was all the way I could do. . . . I just let up on the gas as I started upon the tracks; my engine was running; I just took my foot off the gas and eased up on the tracks. As you approach that building, and as you approach the front of it, you can't see any of the track until you get in front of the depot."

The evidence on the part of plaintiff was to the effect that plaintiff, Phillip Keller, and his witnesses, heard no whistle blow or bell ring.

In *Harris v. R. R.,* 199 N. C., 798 (799), is the following: "The law in this State does not impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his vehicle before driving on the crossing. Whether under all the circumstances, as the evidence tends to show, and as the jury may find from the evidence, the failure of the driver to stop, as well as to look and listen for an approaching train at a railroad crossing, was negligence on his part, is ordinarily a question involving matters of fact as well as of law, and must be determined by the jury under proper instructions from the court." N. C. Code of 1931 (Michie), section 2621(48); *Moseley v. R. R.,* 197 N. C., 628; *Butner v. R. R.,* 199 N. C., 695; *Madrin v. R. R.,* 200 N. C., 784, *S. c.,* 203 N. C., 245; *Campbell v. R. R.,* 201 N. C., 102; *Sanders v. R. R.,* 201 N. C., 672; *Baker v. R. R.,* 202 N. C., 478; *Dancy v. R. R.,* 204 N. C., 303.

Plaintiff testified: "I was going west, going to Tennessee, as I drove towards the track; the light was green, it said to 'Go' and I drove upon the track slowly, was making 6 or 8 miles an hour," etc. The light being green and saying "Go," plaintiff had a right to presume that it was an assurance of safety and that the crossing was clear, and to act with reasonable caution, such as an ordinarily prudent man would use under like circumstances, and drive on the crossing. *Barber v. R. R.,* 193 N. C., 691; *Finch v. R. R.,* 195 N. C., 190 (199); *Moseley v. R. R., supra,* at p. 635.

The defendant contends that in reference to A. J. Keller, who was a passenger in the automobile, it was entitled to an issue of contributory negligence. We cannot so hold. A. J. Keller was in the automobile and the father of the driver, Phillip Keller, who testified: "My father did not own any interest in that car; he had no control over my driving that car, and did not attempt to exercise any control over my driving that car. I certainly knew how to operate the automobile properly."

In *Campbell v. R. R.,* 201 N. C., 102 (107), it is said: "Plaintiff was a guest or gratuitous passenger. It is well settled that 'negligence on the part of the driver will not, ordinarily, be imputed to a guest or occupant of an automobile unless such guest or occupant is the owner of the car or has some kind of control of the driver. *Bagwell v. R. R.,* 167 N. C., 611; *White v. Realty Co.,* 182 N. C., 536; *Williams v. R. R.,* 187 N. C., 348; *Albritton v. Hill,* 190 N. C., 429. Of course, if the negligence of the driver is the sole, only proximate cause of the injury, the injured party could not recover.' *Earwood v. R. R.,* 192 N. C., at p. 30; *Dickey v. R. R.,* 196 N. C., 726." *Smith v. R. R.,* 200 N. C., 177 (180).

In *Nash v. R. R.,* 202 N. C., 30 (33), we find: "Louise Nash was a gratuitous passenger or guest in the automobile driven by Sarah Adams. She was not the owner of the car and had no control of it; neither is there evidence that the deceased was engaged in a joint enterprise with the driver or other occupant of the car. Consequently, any negligence on the part of the driver would not be imputed to the deceased."

In regard to defendant's having a different light at another crossing, we do not think this prejudicial. The defendant brought out the same fact on cross-examination of one of plaintiff's witnesses. See *Blum v. R. R.,* 187 N. C., 648. We think the court below properly refused defendant's prayers for special instructions. The charge was full, clear and gave the law applicable to the facts. In the judgment below we find

No error.

BROGDEN, J., dissenting: The plaintiff Keller testified on cross-examination as follows:

"I told Mr. Pritchard my attorney, before he drafted the complaint, that the sun was shining against these lights that morning and it was hard to tell the green from the red. That is true, I told him that.

"Q. So then on that morning, Mr. Keller, both lights were showing there, the sun shining? Answer: Yes the sun was shining that morning.

"Q. (By the court.) He asked you whether both lights were showing, because the sun was shining against them? Answer: Both lights were showing more, but the green light was showing most. The red light did not show plain but the green light did.

"The red light did not show plain, but it showed a little bit, not plain like you could see the green one. To a certain extent you could see both lights. When the red is showing it sometimes is dim, but before I went on the track I could see the red light some little bit but the green light showed the brightest.

"The sun shined against both and showed against them both and that was because they were poorly hooded, and that is true, and when I told him the sun was shining against those two lights, making it hard to tell which was on the green or red. I told him the truth, and I told him that was the condition the day I went on there, on the morning I drove up there the light did show green then. Afterward I have been going back and forward across there to see what caused this accident, and I seen the reflection of the sun, it caused both lights to show bright and you could not tell much about them at all; but when I drove up there the morning of the accident, the green light did show brightest, the green light showed to be the brightest and I drove on and had the accident."

Consequently, from the plaintiff's own narrative, there was a confusion of signals. One said "go ahead, the way is clear." Another said: "Stop! a train is upon you."

Under such circumstances, what ought a man of reasonable prudence to do? The plaintiff chose to gamble with the situation and thus moved ahead at his peril and therefore ought to abide the result of his own calm deliberate act.

GEORGE D. WOODLEY v. MARTIN GREGORY AND H. C. STRICKLAND.

(Filed 11 October, 1933.)

Mortgages C c—Indexing of mortgage on lands owned by life tenant and remainderman in name of life tenant only held insufficient.

The provisions of our statute as to the indexing and cross-indexing of deeds or mortgages is mandatory and requires that such instruments shall be indexed and cross-indexed in the names of all the parties thereto under the proper letter of the alphabet, and the indexing and cross-indexing of a deed of trust given by a life tenant and the remainderman owning the land, in the name of the life tenant only followed by the words "*et als*," is not a sufficient compliance with the statute, and where the life tenant and remainderman have subsequently executed another deed of trust on the same lands which is registered, indexed and cross-indexed in compliance with the statute, the purchaser under foreclosure of the second deed of trust acquires title free from the lien of the improperly indexed prior deed of trust. N. C. Code, 1931, sec. 3561. The case of *Ins. Co. v. Forbes*, 203 N. C., 252, in which the lien was indexed under "S. T. *et ux*." cited and distinguished.

STACY, C. J., dissenting.

BROGDEN, J., concurs in dissent.

APPEAL by plaintiff from *Grady, J.,* at Chambers, 4 March, 1933. From HARNETT. Reversed.

The findings of fact and judgment in the court below are as follows:

"In this cause a restraining order was issued, prohibiting the defendant, H. C. Strickland, trustee, from foreclosing a certain deed of trust, referred to in the complaint; and the cause came on for hearing, by consent of all the parties, as above stated, and motion was made by the plaintiff for a continuation of said restraining order until the final hearing, and motion by the defendants for a dissolution of said order. The facts are found to be as follows, as they appear of record, and by consent and admissions of the parties, made at the hearing.

The lands in controversy, 33 acres, were conveyed by W. N. Harper and wife to Lugenia Adams, for life, and then in remainder to Della Adams Gregory, her daughter, in fee simple, by deed dated 2 January, 1930, and recorded in Book 235, at page 145. Said deed is made a part of this finding of fact.

Said deed is indexed in the following manner:

DIRECT INDEX

Grantor	*Grantee*	*Book*	*Page*
Harper, W. N. and wife, Sadie	Adams, Lugenia, *et al.*	235	145

REVERSE INDEX

Grantee	*Grantor*	*Book*	*Page*
Adams, Lugenia, *et al.*	Harper, W. N. and wife, Sadie	235	145

Said deed was not indexed or cross-indexed under the name of Della A. Gregory, or in the name of her husband, H. L. Gregory.

On 9 January, 1931, Lugenia Adams, life tenant, together with her daughter, Della Adams Gregory, remainderman, and H. L. Gregory, husband of Della, executed a deed of trust to H. C. Strickland, trustee on the lands in controversy, for the purpose of securing a note in the sum of $400.00, payable to Martin Gregory, due on 1 January, 1932. Said deed of trust is regular in form, contains the names of all grantors and grantees; and was duly filed and recorded on 15 January, 1931, at 9:00 a.m.; the index and cross-index of said deed of trust are as follows:

DIRECT INDEX

Grantor	*Grantee*	*Book*	*Page*
Adams, Lugenia, widow, *et als.*	Strickland, H. C., Trustee	239	274

REVERSE INDEX

Grantee	*Grantor*	*Book*	*Page*
Strickland, H. C., Trustee	Adams, Lugenia, widow, *et als.*	239	274

Said deed of trust was not indexed or cross-indexed under the family name Gregory, or of Della Adams Gregory, or her husband.

The plaintiff seeks to enjoin the threatened foreclosure of said deed of trust upon the ground that it is improperly indexed and cross-indexed, and is not sufficient notice to him, he holding, as he alleges, a title to said lands under proper deeds, properly indexed and recorded.

The plaintiff's claim to the lands in question arises as follows:

On 25 March, 1931, Lugenia Adams, life tenant, and Della Adams Gregory, remainderman, with her husband, H. L. Gregory, executed to one A. T. Avery a deed of trust on said 33-acre tract of land, for the purpose of securing certain indebtedness therein referred to. Said deed of trust is in proper form, and was duly filed and recorded at 8:00 a.m. on 26 March, 1931. The cross-index of said deed of trust is as follows:

DIRECT INDEX

Grantor	*Grantee*	*Book*	*Page*
Adams, Lugenia, *et al.*	A. T. Avery, Trustee.	241	56
Gregory, Henry and wife	A. T. Avery, Trustee.	241	56

REVERSE INDEX

Grantee	*Grantor*	*Book*	*Page*
A. T. Avery, Trustee.	Gregory, Henry & wife, *et als.*	241	56

The above deed of trust from Gregory and wife, and Adams, to Avery, trustee, is properly indexed and cross-indexed in the name of all the parties thereto under their respective family names.

Said deed of trust was foreclosed by said A. T. Avery, trustee, by the usual notice of sale, and the 33-acre tract of land was purchased by the plaintiff, and a deed executed and delivered to him by said trustee, which deed is recorded in Book 243, at page 404, of Harnett County registry, the same having been recorded on 25 January, 1933.

The deeds referred to in these findings of fact are all in proper form and show the names of all grantors and grantees.

The plaintiff admits that he knew of the life estate of Mrs. Lugenia Adams, as it appeared of record. The deed to Mrs. Adams and her daughter, Della Adams Gregory from W. N. Harper and wife, constitutes a link in the plaintiff's chain of title, and he is bound to know its contents. By the most casual reading of said deed he could have ascertained that Mrs. Lugenia Adams owned a life estate in said land. He purchased under a deed of trust executed by Lugenia Adams. He should have inquired at once 'What has become of the interest of Lugenia Adams?' Even the index itself showed that there were others named in said deed as grantees, for the index is to 'Lugenia Adams *et al.*'

The deed of trust to Strickland, trustee, while indexed under the name of Lugenia Adams, also carries the words in addition thereto of 'Widow *et al.*,' both in the direct and reverse indexes.

The plaintiff alleges that he examined the record carefully, and he also alleges that Mrs. Adams has a life estate in the land which passed under the deed of trust to Strickland, trustee. He was bound to know from the record which he examined that there were other parties interested in the land. He only had to read the deed in his own chain of title to see who they were. Furthermore, knowing that Mrs. Adams owned a life estate in the land, he should have seen from her deed to Strickland, trustee that there were others who had executed it with her.

The court is of the opinion that under the rule of the court in the case of *West v. Jackson,* 198 N. C., 693, the plaintiff was fixed with such notice as an inspection of the records would have disclosed, and that having failed to examine them, he cannot now be heard to complain, or to show that he did not know what said records contained.

This action was brought solely for injunctive relief, and, as the court is of the opinion that the plaintiff cannot recover, it is now ordered and adjudged that the injunction be dissolved, and the action is dismissed and nonsuited at the costs of the plaintiff."

George D. Woodley and Clifford & Williams for plaintiff.
Dupree & Strickland for defendants.

CLARKSON, J. Does a prior deed of trust indexed and cross-indexed on the direct and reverse indexes of land conveyances in the full name of one of the grantors therein, with the abbreviations as to the other grantors *"et al.,"* constitute sufficient notice to a purchaser at a sale under a subsequent deed of trust properly indexed and cross-indexed as to all the grantors? We think not, but would be to the grantor properly indexed.

On account of the importance of the controversy, we quote the statute, N. C. Code, 1931 (Michie), section 3561, in full: "The register of deeds shall provide and keep in his office full and complete alphabetic indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well bound books, and shall state in full the names of all parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and wherever the 'Family' index system shall be in use, to also show the name of each party under the appropriate family name and the initials of said party under the appropriate alphabetical arrangement of said index; and all instruments shall be indexed according to the particular system in use in the respective office in which the instrument is filed for record. Reference shall be made, opposite each name to the page, title or number of the book in which is registered any instrument; provided, that where the 'Family' system hereinbefore referred to has not been installed, but there has been installed an indexing system having subdivisions of the several letters of the alphabet, a registered instrument shall be deemed to be properly indexed only when the same shall have been indexed under the correct subdivision of the appropriate letter of the alphabet. *Provided further,* that no instrument shall be deemed to be properly registered until the same has been properly indexed as herein provided. *Provided further,* that in all counties where a separate system is kept for chattel mortgages or other instruments concerning personal property, no instrument affecting the title to real estate shall be deemed to be properly registered until the same has been properly registered and indexed in the books and index system kept for real estate conveyances; *Provided further,* that it shall be the duty of the register of deeds of each county, in which there is a separate index for conveyances of personal property and for those of real estate, to double index every such conveyance, provided that such conveyance shall contain both species of property. A violation of this section shall constitute a misdemeanor." See chapter 327, Public Laws, 1929, where former sections C. S., 3560 and 3561 are amended.

In *Heaton v. Heaton,* 196 N. C., 475, it is held: The proper indexing of a mortgage upon lands is an essential part of its registration, and where the husband and wife make a mortgage on her lands which is only indexed by the register of deeds in the name of the husband, it is not good as against a subsequent purchaser for value by deed from the husband and wife that had been properly indexed and registered. C. S., 3561. *Pruitt v. Parker,* 201 N. C., 697; *Watkins v. Simonds,* 202 N. C., 746.

It will be noted that the statute is mandatory *"Provided further,* that no instrument shall be deemed to be properly registered until the same has been properly indexed as herein provided." It is also provided that the register of deeds shall in indexing "state in full the names of all parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed," etc.

In *West v. Jackson,* 198 N. C., 693, where the husband and wife mortgaged their lands held by the entireties and the mortgage is indexed and cross-indexed under "J. H. and wife," the name of the wife not appearing on the index although it appeared on the mortgage deed, this Court held was a sufficient registration.

In *Insurance Co. v. Forbes,* 203 N. C., 252, 254, the plaintiff contended "That the deed of trust under which it purchased the land, being the second deed of trust upon the land, constitutes a first lien, for that the Forbes deed of trust was not properly cross-indexed; that is to say the cross-indexing 'Tucker, S. D. *et ux.* to F. J. Forbes, trustee,' was not a proper indexing of the instrument." In that case, the Court said: "The merit of the controversy is determined by the principles of law declared in *West v. Jackson,* 198 N. C., 693, 153 S. E., 257. The Court said: 'It must be conceded that the indexing and cross-indexing of the deed of trust in the case at bar is not a strict compliance with the statute, and the registers of deeds throughout the State should doubtless set out on the index and cross-index the name of the wife. There are perhaps hundreds of deeds of trust in the State indexed and cross-indexed in the same manner employed in the present case, and we are not inclined to strike down these instruments as a matter of law, particularly when there was sufficient information upon the index and cross-index to create the duty of making inquiry.' "

From the clear and mandatory language of the statute, we do not think the principle laid down in the *West* and *Insurance Co. cases, supra,* should be extended further as in this case to the index that only showed *et als.*" The learned and careful judge in the court below relied on the *West case, supra,* which does not go as far as the case at bar, but we construe and not make the law. We are bound by the statute as written. For the reasons given, the judgment of the court below is

Reversed.

STACY, C. J., dissenting: It is now established law in this jurisdiction that the proper indexing and cross-indexing of instruments required to be registered is an essential part of their registration. *Story v. Slade,* 199 N. C., 596, 155 S. E., 256; *Bank v. Harrington,* 193 N. C., 625, 137 S. E., 712; *Dewey v. Sugg,* 109 N. C., 328. (Judgment.)

It is likewise held for law with us "that an index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found." *Ely v. Norman,* 175 N. C., 294, 95 S. E., 543; *West v. Jackson,* 198 N. C., 693, 153 S. E., 257; *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949.

In the instant case, it seems the spirit of the law, if not the letter, has been sufficiently met to put a careful or prudent examiner upon inquiry, and such inquiry would have disclosed the remainder interest of Della Adams Gregory in the *locus in quo.*

The whole purpose of the registration law is to give notice. Hence, a substantial compliance with the provisions of the statute, which actually or constructively does give notice, though defective in some minor particular, ought not to be held entirely for naught, for the interest of the lienholder is at least equal to that of the examiner. The failure to dot an "i," or to cross a "t," is not forsooth the same thing as to omit to use the letter altogether. And even bad spelling is not always fatal. Nor should the indexing and cross-indexing of a register of deeds be completely blotted out simply because another might have done it better. In this respect the standard of perfection is too high for practicality.

BROGDEN, J., concurs in dissent.

JOHN P. WISE, ADMINISTRATOR OF CLARA WISE, v. GRAHAM HOLLOWELL.

(Filed 11 October, 1933.)

1. **States A a—**

An action instituted in the courts of this State to recover for wrongful death resulting from an accident occurring in another State is governed by the laws of such other state relating to negligence and liability.

2. **Automobiles C j—Under Virginia law gratuitous guest may not recover against driver except for culpable negligence.**

Under the laws of Virginia a gratuitous guest in an automobile may not recover damages from the driver for negligent injury unless the injury is the result of the driver's culpable negligence, and the law of Virginia governs an action instituted here involving liability of a driver for damages resulting from an accident occurring in Virginia.

3. **Automobiles C n—Culpable negligence is not the same as criminal negligence.**

In an action involving the issue of wanton or culpable negligence, defendant's exception to the trial court's definition of "wanton" as implying reckless and criminal indifference to consequences and the rights of others, is not sustained, defendant having no reason to complain since an act may be culpable without being criminal.

4. **Same—Evidence of culpable negligence in driving held sufficient.**

Evidence tending to show that defendant drove his car along a beach at forty-five or fifty miles an hour, that there were small ridges, and soft places in the sand, and that pieces of wrecks were buried in the sand of which condition the driver had knowledge, and that he disregarded the repeated protests and requests of a guest in the car to slacken the speed of the car, and turned the car over and killed the guest when he attempted to swerve the car around an old wreck nearly buried in the sand, *is held* sufficient evidence of wanton and reckless driving to be submitted to the jury on the issue of culpable negligence.

5. **Same—Charge of court as to contributory negligence of guest held without error.**

In this action to recover for the wrongful death of plaintiff's intestate who was killed in a collision occurring in Virginia while intestate was a guest in defendant's car, the Virginia law requiring a showing of culpable negligence on the part of defendant applied. The court instructed the jury on the question of intestate's contributory negligence that defendant must have knowingly and wantonly added to the risks which might ordinarily have been expected under the circumstances, in order for plaintiff to recover, and defined "knowingly" as "intentionally." *Held*, the charge does not contain reversible error on defendant's exceptions.

6. **States A a—In transitory actions lex loci governs substance of controversy and lex fori governs matters of procedure.**

In an action for wrongful death resulting from an accident occurring in another state the law of the state in which the accident took place governs as to all matters pertaining to the substance of the cause of action or which affects the rights of the parties, while matters relating to procedure are governed by the laws of the state wherein the action is brought, but the measure of damages affects a substantial right and is governed by the *lex loci*, and where the trial court has erroneously applied the measure of damages in accordance with our laws a new trial on the issue of damages will be awarded.

CONNOR, J., dissenting.

APPEAL by defendant from *Barnhill, J.*, at May-June Term, 1933, of DARE.

This is an action for the wrongful death of the plaintiff's intestate. The defendant owned a Chevrolet car in which on 10 July, 1932, at two-thirty in the afternoon he started with others on a trip from Nags Head to Ocean View, Virginia. In the front seat were the defendant, who drove the car, the defendant's wife, and John Hollowell, and in the rumble were Clara Wise, the deceased, and Ira Partridge. When the party reached the ocean beach the defendant, according to his own testimony, attained a speed of fifty or fifty-five miles an hour. Along the beach were ridges or hills described as camel backs; the sand between them was soft and the way was rough. When the car ran in the soft places it gave the defendant trouble. He testified, "There were high places and low places—something like going on a loop-de-loop up and down." In reference to his operation of the car, after saying that he drove it in the usual and customary manner of driving on the beach, he remarked: "Run her like I generally drive her. I don't fool when I get in her, but generally drive her like I want to; when I start out I generally let her go . . . I said they were built to drive and I drive them. I don't generally fool with one when I take hold of her." He admitted that the deceased had requested him several times not to drive so fast, and said that his speed was between forty and forty-five miles just before the accident.

There was evidence for the plaintiff tending to show that the death occurred at about four-thirty; that the car was running "right along the wash of the ocean where the soil was sticky and the sand was soft" at the rate of forty-five or fifty miles; that the deceased asked the defendant two or three times to reduce the speed; that the car was "jumping up and down" and those in the rumble were "bouncing pretty nearly out of the car all the time"; that the beach was steep, in consequence of which one side of the car was higher than the other; that the car approached the remains of a wrecked vessel lying on the beach, a part buried in the sand and a part exposed to view; and that the defendant in attempting to turn the car to the left struck the wreck and caused the car to skid, overturn, and kill the intestate.

Mrs. Hollowell testified: "I don't know how fast Graham was driving as he got in the vicinity of the wreck. I know he was going fast. Protest was made to him about the speed the car was going. My sister, Clara, asked him to slow down three times. If he did slow down I could not tell it. She asked him to slow the speed of the car just a few minutes before the accident . . . it was loose sand; there were pebbles and gravels that made it soft. I do not know how close he got to the wreck before he made a turn to the left. He was right on it. The car turned over; after it righted itself it was further up the bank."

Referring to the accident the defendant testified: "I was looking on the road when I first saw the wreck; may not have been looking at it when I got close to it—when I saw the wreck I didn't have time to stop; when I first saw it I didn't have many minutes to think and I knew if I went around it that way I was going in the sea and I rapped her down so she would go by on the beach and she skidded. I must have been the length of the car from her when I saw her, and instead of going up, the sand slid me and she hit. . . . The wreck was there the last time I drove it; had been there ten or twelve years . . . I knew there were wrecks all along there. I had seen this particular wreck before but had never taken notice of it."

It was admitted that the plaintiff was a gratuitous passenger and that the accident and her death occurred in the State of Virginia.

The two issues submitted to the jury were answered in favor of the plaintiff:

1. Was the death of the plaintiff's intestate caused by the wanton or culpable negligence of the defendant?

2. If so, what damage, if any, is the plaintiff entitled to recover?

Judgment for plaintiff; appeal by defendant.

Thomas Creekmore and Murray Allen for appellant.

C. E. Bailey and M. B. Simpson for appellee.

ADAMS, J. It is admitted that the accident and the death of the intestate occurred in the State of Virginia. The measure of the defendant's duty and the question of his liability for negligence must be determined by the law of that State, for if the act complained of is insufficient to constitute a cause of action there it is likewise insufficient here. If under the *lex loci* there is a right of action, comity permits it to be prosecuted in another jurisdiction unless public policy forbids. This is conceded. Minor on Conflict of Laws, 479, sec. 194; Goodrich on Conflict of Laws, 199; *Howard v. Howard,* 200 N. C., 574; *Hipps v. R. R.,* 177 N. C., 472; *Harrison v. R. R.,* 168 N. C., 382; *Harrill v. R. R.,* 132 N. C., 655.

The deceased was riding gratuitously in the defendant's car for her own pleasure. With respect to liability for the death of a guest caused by the negligence of the driver of a motor vehicle under these circumstances, the Supreme Court of Appeals of Virginia has held that the plaintiff must establish a degree of negligence greater than might have been adequate had the deceased paid for her transportation. Specifically applying the principle the Court has used this language: "To hold that a guest who, for his own pleasure, is riding with his host, may recover from him for injuries suffered where there is no culpable negligence, shocks one's sense of justice. The driver is often not an expert and makes no implied representations beyond these, namely, that he will not knowingly or wantonly add to those perils which may ordinarily be expected and that there are no known defects in the car which make its operation particularly hazardous. Moreover, he should disclose to his guest any other peril not patent. Beyond this all risks are assumed. While automobiles in themselves may not be dangerous instrumentalities, yet their use carries with them dangers that cannot be forgotten." *Boggs v. Plybon,* 160 S. E., 77.

This case, which was approved in *Jones v. Massie,* 163 S. E., 63, enunciates the rule that it is incumbent upon the plaintiff in the present action to establish culpable negligence—that is, to show that the defendant knowingly or wantonly committed an act which added to the ordinary perils of the journey.

As provided by statute the defendant made the usual motions for nonsuit on the ground that the evidence does not warrant a finding of culpable negligence and that the deceased assumed the risk of the injury that caused her death.

It will be observed that the negligence embodied in the first issue is such as is "wanton or culpable." The trial court defined the word "wanton" as implying reckless and criminal indifference to consequences or to the rights of others; a spirit of mischief toward the occupants of the car; conduct which is culpable—a heedless indifference to the safety and rights of others.

An act is wanton when, being needless, it manifests no rightful purpose, but a reckless indifference to the interests of others; and it may be culpable without being criminal. *Everett v. Receivers,* 121 N. C., 519; Black's Law Dictionary, 304, 1217. So, it is apparent that the defendant has no sound reason for complaining of the court's delimitation of the terms. It is clear, also, that there is evidence to sustain the finding that the defendant was culpably negligent.

An analysis of the defendant's testimony reveals a spirit of reckless disregard of the rights of the deceased. His indifference to consequences is manifest in his seemingly flippant description of his driving; in his refusal to heed the repeated protests of the deceased; in his approach to the projecting arm of the wrecked vessel over the camel backs at a speed of forty-five or fifty miles an hour, disregarding the final protest of the deceased, until he was within the length of his car from the place of the collision, though he knew the remnant of the boat had been there for a number of years; also in other respects reflected by the testimony of the witnesses. In reference to the assumption of risk the court instructed the jury in accordance with the *lex loci* that the plaintiff must prove by the greater weight of the evidence that the defendant knowingly or wantonly added to the risks which might ordinarily have been expected under the circumstances by a gratuitous passenger. The explanatory instruction that "knowingly" means intentionally meets the defendant's objection that known negligence is not equivalent to wanton negligence.

No exception points to reversible error on the first issue; but we think the defendant is entitled to a new trial on the issue as to damages.

In the trial of an action whatever relates merely to the remedy and constitutes a part of the procedure, is determined by the law of the forum; but whatever goes to the substance of the controversy and affects the rights of the parties is governed by the *lex loci. Pritchard v. Norton,* 106 U. S., 124, 27 L. Ed., 104; *Haws v. Cragie,* 49 N. C., 394; *Arrington v. Arrington,* 127 N. C., 190; *Patton v. Lumber Co.,* 171 N. C., 837. The weight of authority is in support of the rule that in an action for wrongful death, if the injury and death occurred outside the State in which the action is brought, the amount of the recovery is governed by the *lex loci* and not by the *lex fori. Northern Pacific R. Co. v. Babcock,* 154 U. S., 190, 38 L. Ed., 958; *Slater v. Mexican National R. Co.,* 194 U. S., 120, 48 L. Ed., 900; *Atchison, Topeka & S. F. R. Co. v. Nichols,* 264 U. S., 348, 68 L. Ed., 720; 17 C. J., 1324.

In the present case the jury awarded damages, under the instruction of the trial judge, in compliance with our statute (C. S., 161), which prescribes a fair and just compensation for the pecuniary injury resulting from death, as expounded by the decisions of this Court; but the Virginia statute differs from ours. It provides that the jury may award such damages as to it may seem fair and just, not exceeding a stated sum, and may direct in what proportion they may be distributed. Virginia Code of 1930, sec. 5787. The measure of damages must be determined according to the statute of Virginia, as construed by the Supreme Court of Appeals.

Partial new trial.

CONNOR, J., dissenting: It is conceded that plaintiff cannot recover in this action unless the death of his intestate was caused by the wanton or culpable negligence of the defendant as alleged in the complaint.

Plaintiff was riding in defendant's automobile as his gratuitous guest, at the time she suffered her fatal injuries. Under the law of the State of Virginia, which determines the cause of action on which plaintiff seeks to recover, a gratuitous guest cannot recover of the driver of the automobile in which she is riding damages resulting from injuries caused by his negligence in operating the automobile, unless such negligence is wanton or culpable.

Culpable negligence has been defined by this Court as "such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences, or a heedless indifference to the safety and rights of others." *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

I do not think that there was any evidence of such negligence at the trial of this action, and for that reason I am of the opinion that there was error in the refusal of the trial court to dismiss this action by judgment as of nonsuit.

All the evidence showed that immediately before the accident which resulted in the death of plaintiff's intestate, the defendant was driving his automobile along the beach at a speed of from 40 to 50 miles per hour, and that this was the usual and customary speed at which automobiles were driven along the beach. Plaintiff's intestate, who was his sister-in-law, complained of the speed only because she was sitting in the "rumble" seat, and as the automobile passed over the camel backs, or ridges in the sand, she was thereby caused to bounce up and down. None of the other passengers complained of the speed. The evidence showed that it was necessary for the defendant to drive his automobile rapidly over the camel backs, because of the soft sand along the beach. I do not think that the evidence showed that the defendant was in any respect thoughtlessly disregardful of the consequences to the plaintiff's intestate, or was heedlessly indifferent to her comfort or safety. The accident occurred when the automobile struck the wreck which was embedded in the sand.

Conceding, however, that as the Court holds, there was evidence sufficient to support an affirmative answer to the first issue, I concur in the decision which results in a new trial of the issue involving the damages which plaintiff is entitled to recover of the defendant.

J. W. RODWELL, JR., AND GAY C. CABELL, GUARDIAN FOR GERALDINE RODWELL-CABELL AND CHERRY RODWELL-CABELL, MINORS, v. CAMEL CITY COACH COMPANY, INCORPORATED.

(Filed 11 October, 1933.)

1. **Pleadings A a—Complaint held to state joint cause by plaintiffs, all parties plaintiff being estopped from bringing subsequent action.**

Deceased was killed in a collision occurring while she was riding on a bus in another state. The statute of the state wherein the collision occurred required that an action to recover for her wrongful death should be brought jointly by her husband and her minor children. Plaintiffs instituted suit here to recover under the statute, the complaint being drawn in the name of the husband and minor children of deceased, and containing a joint prayer for damages. Defendant demurred on the ground that the allegations of the complaint were not sufficient to constitute a joinder by the husband in the action. *Held*, liberally construing the complaint as a whole, it stated a joint action by the husband and children, since the husband would thereafter be barred from setting up an inconsistent claim against the adverse party on the same subject-matter.

2. **States A a—Difference in parties and measure of damages will not prevent our courts from hearing action arising in another state.**

The fact that the statute of the state in which a collision occurs, resulting in death of the intestate, differs from our statute for wrongful death in the provision as to the parties who may maintain the suit and the measure of damages recoverable is not sufficient to deprive our courts of jurisdiction to hear the action and apply the laws of such other state, the rule being that transitory actions arising in another state may be maintained here under comity unless contrary to public policy, and the difference in the statutes not being sufficient to deprive our courts of jurisdiction on that ground.

3. **Same—Provision in statute of another state for recovery of penal damages does not render its penal statute unenforceable in this State.**

The rule that the courts of one state will not enforce a penal statute of another state applies only to statutes which are entirely penal and prescribe a punishment for violation of law, and a statute that merely provides for the recovery of punitive damages for the benefit of the individual bringing the action as a part of the compensatory damages is not such a penal statute as to come within the rule, and in this case, *held*, plaintiffs, residents of North Carolina, could maintain an action in the courts of this State to recover for the wrongful death of the intestate resulting from a collision occurring in Georgia while she was a passenger for hire on a motor bus, and our courts had jurisdiction to apply the Georgia law providing that such action could be maintained by the husband and children of intestate and that punitive damages could be recovered upon a showing of negligence.

CIVIL ACTION, before *Finley, J.*, at September Term, 1932, of ROWAN.

The plaintiffs are the surviving husband and minor children of Mattie Connor Rodwell. It was alleged that on 23 November, 1931, Mattie

Connor Rodwell purchased a ticket from the defendant in Jacksonville, Florida, entitling her to passage on a bus owned and operated by the defendant, to Charlotte, North Carolina, and return, and that on 24 November, 1931, while such passenger at or near the town of Louisville, Georgia, the defendant, "its servants, agents and employees, carelessly, recklessly, and negligently, and in direct violation of the Motor Vehicle Laws of the State of Georgia, operated and propelled said automobile bus over and upon said highway at an unlawful, careless, reckless and negligent rate of speed, failed to keep said automobile bus under proper control; failed to keep a safe and proper lookout; failed to provide the automobile bus with suitable and proper safety appliances and lighting equipment; and did by reason thereof carelessly, recklessly and negligently drive and propel said automobile bus, carrying the said Mattie Connor Rodwell as a passenger for hire therein, into and against the concrete posts and sides of a bridge of said highway, wrecking said bus and injuring said Mattie Connor Rodwell by crushing her arm, chest, head and other parts of her body to such an extent that she died as a result thereof within a few hours thereafter."

The wrongful death statute of Georgia is pleaded in the complaint. The pertinent portions of said statute are as follows: "The husband may recover for the homicide of his wife, and if she leave a child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of deceased, as shown by the evidence, and with the right of survivorship as to said suit if she die pending the action. A mother, or, if no mother, a father, may recover for the homicide of the child, minor or *sui juris,* upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child. In cases where there is no person entitled to sue under the foregoing provisions of this section, the administrator of the deceased person may sue for and recover for the benefit of the next of kin, if dependent upon the deceased, or to whose support the deceased contributed, in which event the amount of recovery shall be determined by the extent of the dependency or the pecuniary loss sustained by the next of kin. . . . The word 'homicide' used in the preceding section, shall be held to include all cases where the death of a human being results from a crime or from criminal or other negligence. The plaintiff, whether widow, or child, or children, may recover the full value of the life of the deceased, as shown by the evidence," etc. Certain other sections from the Motor Vehicle Laws of Georgia are alleged in the complaint, together with a clause of the Georgia Code, as follows: "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such company, shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. The provisions of this bill shall also apply to all persons, firms or corporations operating busses for hire," etc.

The surviving husband, J. W. Rodwell, is a resident of the county of Davie, North Carolina, and it was alleged in the complaint "that the plaintiff, J. W. Rodwell, Jr., surviving husband, and Gay C. Cabell, guardian for the surviving children of said Mattie Connor Rodwell, are entitled to maintain this motion for recovery of all damages as provided by the laws of the State of Georgia, etc. . . . Wherefore, the plaintiffs pray that they have and recover judgment of the defendant . . . in the sum of $75,000 damages," etc.

The defendant demurred to the complaint upon the ground that it appeared upon the face of the complaint that the action was not a joint action by the husband, J. W. Rodwell, and the children. Thereafter the defendant filed a second demurrer upon the ground "that it appears upon the face of said complaint that the court has no jurisdiction of the subject-matter of the action for that there is such a material and substantial difference and dissimilarity between the statutory laws of the State of Georgia alleged in said complaint and relied on by the plaintiffs for recovery herein, and the statutory laws of the State of North Carolina relative to actions for wrongful death, in respect to parties plaintiff, elements, nature, measure, amount and method of assessing damages, and method of distribution thereof, and in other respects, that the courts of this State will not recognize or enforce the provisions of said alleged Georgia statutes in any action brought in this State for the recovery of damages thereunder for alleged wrongful death in said State of Georgia."

The trial judge overruled both demurrers and the defendant appealed.

Charles L. Coggin and Robert S. McNeill for plaintiffs.
R. M. Robinson for defendant.

BROGDEN, J. The demurrers present for decision two questions of law:

1. Does the complaint disclose a joint suit by the surviving husband and children of the deceased?

2. Is the wrongful death statute of Georgia repugnant to the public policy of this State, to such a degree as to deprive the trial courts of this State of jurisdiction to hear and determine a cause for the negligent killing in the State of Georgia of a resident of this State?

The first demurrer was properly overruled. Complaints assailed only by demurrer are to be construed liberally in favor of maintaining the cause of action. The entire complaint in the present case, when so construed, is sufficient. The husband and the children join in the action as plaintiffs and assert that they "are entitled to maintain this motion for recovery of all damages as provided by the laws of the State of Georgia." There is a joint prayer for the recovery of damages. Moreover, by reason of the fact that the husband has joined in the suit as a party plaintiff, the law will not permit him to make an inconsistent claim or take a conflicting position in any subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same and the same questions are involved. *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350.

The second proposition of law involves the solution of the question as to whether the wrongful death statute of Georgia is so dissimilar in scope, meaning, and practical application as to contravene the public policy of this State. North Carolina has a wrongful death statute, C. S., 160, which requires that a suit must be brought by an executor, administrator, or collector of the decedent, and any recovery shall not be deemed or applied as assets but shall be distributed in accordance with the statute of distributions. The wrongful death statute of Georgia provides that a widow, child or children; or husband, child or children "shall sue jointly and not separately, with the right to recover the full value of the life of deceased, as shown by the evidence." Thus, the dissimilarity consists in two major differences: first, the persons entitled to maintain the suit, and second, the measure of damages. This Court in *Hancock v. Telegraph Co.,* 137 N. C., 497, 49 S. E., 952, spoke as follows: "The validity and interpretation of the contract, as well as the rule measuring the damages arising upon a breach and the company's liability therefor, are to be determined by the laws of the former state where the contract originated." Also, in *Howard v. Howard,* 200 N. C., 574, 158 S. E., 101, it was written: "The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done; that is, the measure of the defendant's duty and his liability for negligence must be determined by the law of New Jersey." See *Harrison v. R. R.*, 168 N. C., 382, 84 S. E., 519. American courts generally have not thought that a mere difference as to the person entitled to maintain a given cause of action or a mere difference in the measure of damages is sufficient or adequate dissimilarity to work a denial of the usual principles of comity prevailing among the states of the Union. For instance, in the *Howard case, supra, Adams, J.,* wrote: "But the fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other. 'It by no means follows that because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens.' " The same idea prevails in other jurisdictions. Thus, in *Brown v. Perry,* 77 A. L. R., 1294, the Vermont Court spoke as follows: "The courts of one state will not enforce a penal statute of another. . . . Comity never requires a court to give effect to the law of another state which conflicts with that of its own. . . . The tendency of modern decisions is toward a broader comity in the enforcement of rights created by the legislatures of sister states. The general rule is that when an action is transitory, and the right has become fixed and liability has been incurred in the state where the transaction occurred. such right of action may be pursued and such liability enforced in any court which has jurisdiction of such matters and can secure jurisdiction of the parties, provided that the statute under which the cause of action arose is not inconsistent with the public policy of the state in which the cause of action is sought to be enforced. The court should not, in otherwise proper cases, refuse to apply the law of a foreign state, however unlike its own, unless it be contrary to pure morals or abstract justice, or unless the enforcement would be of evil example and harmful to its own people."

The conclusion is warranted that a difference in the elements or amount of damages does not offend public policy to the extent that an action based upon a wrongful death statute of one state will for such reason alone be denied enforcement in the courts of another. See, also, *Loranger v. Nadeau,* 84 A. L. R., p. 1264, and annotation; *Higgins v. Central Northeastern R. R. Co.,* 29 N. E., 534.

It is a general principle, sanctioned by the decisions of many courts, that a penal statute of one state will not be enforced in the courts of another, and the defendant asserts that the wrongful death statute of Georgia permits the recovery of punitive or exemplary damages, and, therefore, that such statute is penal, and hence unenforceable in the courts of North Carolina.

The views of the divergent schools of thought upon the subject are clearly and logically expressed by the Maryland Court in *London Guaranty & Accident Co. v. Balgowan S. S. Co.,* 155 Atlantic, 334, and in the dissenting opinion of *McNeill, J.,* in *Gardner v. Rumsey,* 196 Pac., 941, as follows: "The rule that a penal statute will not be enforced outside the territorial jurisdiction of the Legislature enacting it applies only to such statutes as are entirely penal, their sole purpose being to inflict punishment for the violation of a law, for the public benefit, and not to those which are in part compensatory, the violator being required to make good to an individual a possible loss having some connection with his default." To like effect the Supreme Court of Vermont in *Wellman v. Mead,* 107 Atlantic, 396, wrote: "The question of whether a statute of one state which in some aspects may be penal is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends on whether its purpose is to punish an offense against the public justice of the state, or whether it affords a private remedy to a person injured by the wrongful act." 21 R. C. L., p. 225, states the rule as follows: "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual. And a distinction has been made between statutes which are entirely penal, their sole purpose being to punish a violation of the law for the public benefit, and those which are in part compensatory, the violator being required to make good to an individual a possible loss having some connection with his default. It is universally held that statutes of the former character can be executed only by the sovereignty enacting them. But by the weight of later authority, and by the better reason, actions may be maintained anywhere to enforce the liability to an individual, created by statutes of the latter kind."

In the case at bar the plaintiff was apparently a resident of North Carolina, and, therefore, had a right to go into the courts of her own state, seeking redress for the wrong and injury inflicted in the State of Georgia. Conceding that the wrongful death statute of Georgia permits the recovery of punitive damages, nevertheless such damages are also compensatory, and this Court is not disposed to hold that the personal representative of a citizen of this State cannot enforce the wrongful death statute of another state where the injury occurred, because in the final analysis, a more liberal measure of damages is available under the statute of the state where the injury occurred. See *L. & N. R. R. Co. v. McCaskell,* 53 Southern, 348.

Affirmed.

EVERETT GOSNELL, BY HIS NEXT FRIEND, S. K. GOSNELL, v. HALCYONE PARKER HILLIARD, EXECUTRIX OF DR. WILLIAM D. HILLIARD, DECEASED.

(Filed 11 October, 1933.)

1. Judgments K b: Attorney and Client C c—Defendant may move to set aside judgment for surprise where attorney has withdrawn without notice.

An attorney generally employed to defend an action enters into an entire contract to follow the proceedings to their determination, and though he may withdraw from the case with the permission of the court in proper instances, his client is entitled to such specific notice, either before or after the withdrawal, as will permit him to protect his rights, and where for the failure of such notice a judgment upon a verdict has been obtained against the client and he was without laches in moving to set it aside for surprise and excusable neglect upon a showing of a meritorious defense, it is correct for the trial judge to grant his motion. C. S., 600.

2. **Attorney and Client C c—Client's failure to pay proper fees upon reasonable demand is ground for withdrawal of attorney.**

While no rule of universal application has been formulated as to the facts and conditions which would justify an attorney generally employed in a case to withdraw from it with the permission of the court, it is generally held that the client's failure to pay or secure the payment of proper fees upon reasonable demand will justify the attorney in requesting permission of the court to withdraw.

3. **Judgments K b—Order in this case setting aside judgment held to have also set aside verdict upon which it was based.**

Both the verdict and the judgment based thereon may be set aside by the court in proper instances for surprise and excusable neglect since the enactment of Public Laws of 1892, chap. 81, and where it is declared that the judgment in an action be void and set aside and the case retained to be heard upon its merits, the latter clause of the order vacates the verdict.

APPEAL by plaintiff from *Alley, J.*, at April Term, 1933, of MADISON.

On 4 January, 1928, the plaintiff brought suit against the Southern Railway Company, Biltmore Hospital, Incorporated, and Dr. William D. Hilliard, alleging that he had been injured by the negligence of the Southern Railway Company, that he had been put in charge of Dr. Hilliard, agent of the railway company, and injured by his malpractice, and that the hospital, also, was liable for the negligent manner in which he had been treated. Dr. Hilliard died testate on 15 August, 1928, and his executrix was afterwards made defendant.

The action came on for trial at October Term, 1931, of Madison County and was dismissed as to all the defendants. On appeal to the Supreme Court the judgment was affirmed as to the hospital and the railway company and was reversed as to the executrix of Dr. Hilliard. 202 N. C., 234. At April Term, 1932, of Madison County the plaintiff recovered judgment against the present defendant upon issues submitted to the jury when she was not in attendance upon the court and when she was not represented by counsel. On 27 September, 1932, she gave proper notice that she would move to set aside the judgment under C. S., 600 on the ground of excusable neglect. The motion was heard at April Term, 1933, by Judge Alley, who rendered the following judgment:

"This cause coming on to be heard, and being heard before his Honor, Felix E. Alley, judge presiding, and it appearing to the court, and the court finds the facts to be, that, the defendant in the above entitled action, Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, has a good and meritorious defense to said cause; and it further appearing to the court that she was represented by counsel prior to the time of the taking of the judgment, to wit: at April Term, 1932; that prior to said time her counsel, Johnson, Smathers & Rollins, through J. Bat Smathers, of said firm, had advised her, the said Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, that it would be necessary for her to pay his firm some fees for their services performed and to be performed in connection with said cause; that upon receiving said notice by way of letter the said defendant, Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, called upon the said J. Bat Smathers, and in the conversation there was a general discussion in regard to a payment on fees, in which discussion the said Smathers advised the defendant that he would have to have some money; that the said defendant explained to the said Smathers that she had no funds, and had been assured by Mr. Rollins, a former partner of the said J. Bat Smathers, that the case would be properly taken care of, and that she (did) not give it any further thought; that in said conversation the said Smathers advised the defendant that the case would probably be on for trial at the next term of court, but did not state when the term would be held, or at what time the case would probably be tried; that the above is all that was said with regard to the payment of fees; that the said Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, had no further conversation with her attorney, and received no further advice from him as to when the case would be tried; that the said J. Bat Smathers is a reputable attorney, and a member of a reputable firm; that the said above entitled case was placed on the calendar for trial at April Term, 1932, but the defendant had no knowledge that same had been placed on the calendar, or that it would be tried at that term, nor did she know that said Smathers was going to withdraw as counsel, and not represent her at the trial of said case; that when the case was called for trial the said J. Bat Smathers requested that his firm be permitted to withdraw as counsel in said cause, due to the fact that he had not been paid the fees requested, and the permission requested was granted, and the said J. Bat Smathers, for his firm, withdrew as counsel in said cause for the defendant, whereupon the case, without the knowledge or any information on the part of the defendant, was immediately called for trial, and tried, and a verdict was returned by the jury in favor of the plaintiff and against the defendant for the sum of twenty-five hundred dollars ($2,500), and a judgment as appears in the record was entered, adjudging that the plaintiff have and recover of the defendant, the said Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, the sum of twenty-five hundred dollars, ($2,500), and the costs.

That the said Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, at the time of the trial of said cause was the only defendant in said action, the other two defendants, to wit: Southern Railway Company and the Biltmore Hospital, having prior to that time been discharged and the action dismissed as to them.

The court further finds as a fact that the said Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, was guilty of no laches on her part, but was only guilty of such conduct as amounted to excusable neglect; that the said Halcyone Parker Hilliard, executrix of the estate of Dr. William D. Hilliard, as soon as she first discovered that a judgment had been taken against her, to wit: in August, 1932, took immediate and proper action to have the judgment set aside and canceled. The court finds as a fact that Asheville is a distance from Marshall 21 miles and there is a railroad, bus, telegraph and telephone service between said cities.

It is now, therefore, ordered, adjudged and decreed, on motion of Jones & Ward, attorneys for the defendant, that the judgment heretofore entered at the April Term, 1932, of this court in this cause be, and the same is hereby declared void and set aside, and this cause is retained to the end that the same may be heard upon its merits."

The plaintiff excepted and appealed to the Supreme Court.

John A. Hendricks for plaintiff.
Ward & Jones for defendant.

ADAMS, J. An attorney who is retained generally to conduct a legal proceeding enters into an entire contract to follow the proceeding to its termination, and hence cannot abandon the service of his client without sufficient cause and without giving proper notice of his purpose. *Branch v. Walker,* 92 N. C., 87; *Ladd v. Teague,* 126 N. C., 544; *Newkirk v. Stevens,* 152 N. C., 498; *United States v. Curry,* 6 How., 106, 12 L. Ed., 363; *Tenny v. Berger,* 93 N. Y., 524, 45 A. L. R., 263. Weeks states the rule as follows: "An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice." Weeks on Attorneys at Law, sec. 255.

The dual relation sustained by an attorney imposes upon him a dual obligation—the one to his client, the other to the court. He is an officer of the court, *Waddell v. Aycock,* 195 N. C., 263, and can withdraw from a pending action in which he is retained only by leave of the court, *Branch v. Walker, supra, Ladd v. Teague, supra,* and only after having given reasonable notice to his client. This Court has held that if an attorney wishes to withdraw from a case in which he has been employed he must inform his client of his intention, and that he cannot terminate the contractual relation between them without imparting such information. In an analogous case *Davis, J.,* remarked: "Needing counsel and having employed counsel she would not be thus left ignorant of the fact that she had none." *Gooch v. Peebles,* 105 N. C., 411.

No rule of universal application has been formulated with respect to facts or conditions which would justify an attorney in withdrawing from pending litigation; but it is generally held that the client's failure to pay or to secure the payment of proper fees upon reasonable demand will justify the attorney in refusing to proceed with the case. *Tenny v. Berger, supra; Eliot v. Lawton,* 7 Allen, 274, 83 A. D., 683; *Thomas v. Morrison,* 46 S. W., 46; *Bissell v. Zorn,* 99 S. W., 458; *Young v. Lanznar,* 112 S. W., 17; *Silver Peak Gold Min. Co. v. Harris,* 116 Fed., 439. In *Spector v. Greenstein,* 85 Pa. Sup. R., 177, it was held that while an attorney may sever his relation with a client who refuses to pay a fee, his withdrawal should not be allowed in the absence of the client, without notice to him, and without his having an opportunity to be heard.

The attorney who had previously represented the defendant is a reputable attorney and a member of a reputable firm. This finding is set out in the judgment. His fee was not paid and for this reason he withdrew from the case by leave of the court. The decisive question is whether the defendant was entitled to specific notice that her attorney would not represent her at the trial. It is held generally that she was entitled to such notice.

In their last conference the attorney told the defendant that she must "pay his firm some fees for their services performed and to be performed," that "he must have some money"—a remark of frequent repetition in these latter days; but this is all that was said in regard to the payment of fees. There is no finding of fact, indeed no pretense, that the defendant had definite notice of the attorney's intention to withdraw. She was informed that the case would probably be called for trial at the ensuing term of the court, but she did not know when the term would be held or when the case would be tried. It is found as a fact that she had no knowledge that the case had been listed on the calendar or that her attorney intended to retire as counsel. She was entitled either to specific notice in advance that her counsel would retire from the case or, after his withdrawal, that he had retired, and to a reasonable opportunity to obtain other professional assistance.

According to the judgment of the trial court, the defendant has a good and meritorious defense to the plaintiff's action; she acted promptly upon discovery of the judgment against her; and without remissness or laches on her part she is entitled to the relief demanded. We concur in the judgment.

The appellant makes the point that the Superior Court merely declared the judgment void and left the verdict undisturbed. Formerly a judgment based on a verdict could not be set aside for excusable neglect, *Morrison v. McDonald,* 113 N. C., 327; but in 1893 the General Assembly amended the statute by inserting the word "verdict." P. L., 1893, chap. 81. Both the judgment and the verdict may now be vacated for excusable neglect. Accordingly, it was ordered that the judgment entered at April Term, 1932, be declared void and set aside and that the cause be retained "to the end that the same may be heard upon its merits." The latter clause vacates the verdict. Judgment

Affirmed.

MAURICE STEIN v. B. J. LEVINS.

(Filed 11 October, 1933.)

1. **Evidence E b—Unaccepted offer of compromise is not an admission of liability and is incompetent as evidence thereof.**

In a suit by the payee to recover upon negotiable notes an unaccepted offer of compromise made by the maker of the notes is not competent evidence as an admission of liability, nor is the statement of the amount offered as a compromise a statement of a fact independent of the rejected offer such as to render it competent as an admission.

2. **Trial B e—**

The trial judge has the power to grant a motion to strike out incompetent evidence which had been admitted without objection, and the time he should hear the motion is within his discretion.

3. **Bills and Notes H b—Admission of execution of notes establishes prima facie case, but burden on the issue remains on plaintiff.**

Where the defense to an action upon a negotiable note is that the note was given solely for the accommodation of the payee and was not supported by consideration, the defendant's admission of the execution of the notes makes a prima facie case that will take the case to the jury in the payee's action, but does not shift the burden to the defendant to establish his defense by the greater weight of the evidence, the burden of proof on the issue raised by the pleadings remaining on plaintiff throughout the trial.

4. **Same—Admission of execution of notes dispenses with necessity of proving execution but not necessity of introducing them in evidence.**

When matters directly in issue are admitted it is unnecessary to offer the admissions in evidence, but it is otherwise if the admissions are independent of and collateral to the issue raised by the pleadings, and in an action on negotiable notes, the admission by defendant of the execution of the notes dispenses with the necessity of proving execution, but not with the necessity of introducing the notes in evidence.

5. **Trial E c—**

The question whether a witness whose deposition has been taken by the plaintiff and offered by the defendant was a witness for the plaintiff is a subordinate feature of the trial concerning which no instruction is essential in the absence of a written request to that effect.

APPEAL by plaintiff from *Daniels, J.,* at April Term, 1933, of HERTFORD. No error.

The plaintiff instituted this action to recover the amount alleged to be due on two promissory notes, the first of which is as follows:

"$2,000.00. Philadelphia, Pa., 5/15/1930.

After date I promise to pay to the order of M. Stein, two thousand and 00/100 dollars at 4822 N. 10th St., city.

Value received with interest at 6% per annum. No......... Due ....

B. J. Levins."

The other note is identical in form except as to the amount, which is $2,000.

The defense pleaded is a total failure of consideration in that the notes were executed solely as an accommodation to the plaintiff or for the temporary purpose of enabling the plaintiff to borrow money or procure credit.

The jury returned the following verdict:

1. Is the defendant indebted to the plaintiff on the notes set forth in the complaint, and if so, in what amount? Answer: Nothing.

Judgment for defendant; appeal by plaintiff for assigned error.

Joseph B. Burden, W. D. Boone and Manning & Manning for plaintiff.
W. H. S. Burgwyn, J. Carlton Cherry and E. L. Travis for defendant.

ADAMS, J. The following questions and answers appear in the deposition of Joseph Singer:

"Q. Did you ever have any conversations with Mr. Levins concerning this matter? Answer: I did.

Q. Will you tell us what took place? Answer: I tried to get the two of them straightened out, being that they were such good friends so long, and I tried to get the matter thrashed out, and Mr. Levins said he made Stein an offer and he was willing to stick to that offer, not a nickel more.

Q. Do you know the amount of that offer? Answer: Yes.

Q. What was the amount? Answer: $1,000."

At the time the deposition was offered in evidence neither party objected to this testimony, but afterwards the defendant's counsel made a motion to strike it from the record. The motion was granted and the plaintiff excepted.

In our opinion the court committed no error in allowing the motion. It is elementary that evidence of an unaccepted offer of compromise is not admissible. Almost a century ago the principle was stated in an opinion by *Gaston, J.,* in *Poteat v. Badget,* 20 N. C., 349, and has since been maintained. In that case the Court said: "The offer of the defendant unless accepted by the plaintiff, was in no way obligatory. Neither was it an admission of the fact that the defendant owed the sum of fifty dollars. In all fairness it must be understood with reference to the subject-matter before the parties, which was an attempt to adjust a disputed claim. It was a proposition, whether that claim were well or ill-founded, to pay a specific sum as the price of peace. As the plaintiff did not accede to the proposition, the rights of the parties remained precisely as they were before the proposition was made."

In a later opinion this Court remarked that "an offer to compromise a demand is no admission of its rightfulness." *Smith v. Love,* 64 N. C. 439.

The plaintiff concedes the principle but takes the position that the excluded testimony contains the statement of a fact which is entirely independent of the rejected offer and was therefore competent. The question proposed by the plaintiff arose in *Daniel v. Wilkerson,* 35 N. C., 329. There the action was for slanderous words spoken of the plaintiff imputing to him the crime of stealing a hog belonging to the defendant. The plaintiff offered to prove by a witness that after the suit was brought the defendant stated to the witness that he had charged the plaintiff with the crime, but that he did it in a passion and was sorry for it. The defendant objected on the ground that the admission was made pending a treaty of compromise between the parties, the facts in reference to which are set out in the preliminary statement of the case. The Court held that although a rejected proposition of compromise could not be heard, yet admissions of fact made by the defendant in his conversation with the witness, who was not the plaintiff's agent, were competent evidence. It will be observed that the defendant's admission contained no reference to the terms of the proposed settlement. Adhering to *Daniel v. Wilkerson* this Court has said in later cases that the admission of an independent fact made during an attempt to compromise may be given in evidence, though it is otherwise with respect to an offer made for effecting a settlement. *Baynes v. Harris,* 160 N. C., 307; *Montgomery v. Lewis,* 187 N. C., 577; *Lewis v. Lewis,* 192 N. C., 267.

If the plaintiff had proposed to show by Singer that the defendant had made to the plaintiff an unaccepted offer of settlement, the testimony would have been inadmissible because in law the offer would not have been an admission of the defendant's indebtedness. We perceive no sound or satisfactory reason for concluding that the defendant's statement that he had made an offer which in law was not an admission was itself an admission of his liability to the plaintiff. The evidence was incompetent.

That the presiding judge had the power to withdraw the evidence is unquestionable and the time when he should hear the motion was a matter addressed to his discretion. *Cooper v. R. R.,* 163 N. C., 150; *Dugger v. McKesson,* 100 N. C., 1.

The plaintiff requested the court to instruct the jury that as the defendant admitted the execution of the notes and contended that they were given only for the plaintiff's accommodation, the burden was on the defendant to satisfy the jury by the greater weight of the evidence that the notes were given without valuable consideration and only for the accommodation of the plaintiff, and if the defendant failed so to satisfy the jury, the answer to the issue should be "$4,007.50"; otherwise "Nothing."

The plaintiff introduced the notes which, reciting "value received," were made payable to the order of the plaintiff. Being negotiable they imported a valuable consideration. C. S., 2982, 3004; *Hunt v. Eure,* 188 N. C., 716. The court gave the following instruction: "Upon that showing, gentlemen, upon the admission of the defendant, and upon the notes themselves, nothing else appearing, you would find, nothing else appearing, that there is a prima facie case, made in favor of the plaintiff, that is, a presumption, that his notes were given in these terms and that they are due and unpaid. . . . There is no date at which they are payable and, therefore, under the statute, they are payable upon demand; and the defendant testified that these notes were to be returned to him after they had served Stein's purpose; that is, after they had enabled him to borrow money, but they were never returned to him; that he asked about having them returned to him, but for some reason plaintiff did not return them. He testified further that the plaintiff never made any demand on him for any money on these notes, that he never paid any on them and never saw them after they were delivered to Mr. Stein. That being so, prima facie, the plaintiff is entitled to recover, to have you answer this issue, 'Yes.' . . . Whenever a prima facie case is made out, and as I have described in this court that this case is prima facie, in favor of the plaintiff, it is upon the defendant to go forward with his proof, or take the risk before the jury of an adverse verdict, as is said in one of our cases. But, the burden of proof and the burden of the issue remains upon the plaintiff throughout the trial. If the defendant satisfies the jury from the evidence offered by him, or from all the evidence in the case, of the truth of his contention, that this agreement was entered into only for the accommodation of the plaintiff, then, of course, the plaintiff would not be entitled to recover, and, under those circumstances, it would be your duty to answer the issue, 'No'; that is, that the defendant is not indebted to the plaintiff."

This instruction is in accord with the later decisions of this Court. It is a fundamental rule of evidence that the burden is on the party who asserts the affirmative of the issue. *Walker v. Carpenter,* 144 N. C., 674; *Poindexter v. Call,* 182 N. C., 366. The burden of the issue, that is, the burden of proof in the sense of establishing the issue as distinguished from the act of going forward and producing evidence, does not shift from one party to the other. *Cotton Oil Co. v. R. R.,* 183 N. C., 95; *Speas v. Bank,* 188 N. C., 524; *Hunt v. Eure,* 189 N. C., 482. This is not a case in which the subject-matter of a negative averment is peculiarly within the knowledge of the opposing party. *Hosiery Co. v. Express Co.,* 184 N. C., 478.

The later decisions stress the fact that the defendant was not required to rebut the prima facie case by the greater weight of the evidence, *Hunt v. Eure,* 189 N. C., 482, *Speas v. Bank, supra, White v. Hines,* 182 N. C., 275, although expressions seemingly to the contrary may be found in cases in which the burden rather than the quantum of proof was apparently the crucial question. *Piner v. Brittain,* 165 N. C., 401.

In the defendant's brief it is intimated that his admission of the execution and delivery of the notes would have entitled the plaintiff to a verdict on the pleadings and that the burden of proof necessarily devolved upon the defendant. When matters directly in issue are admitted it is not necessary to offer the admission in evidence, but allegations or admissions of matters which are independent of and collateral to the issues raised by the pleadings are available as evidence only when introduced. *McCaskill v. Walker,* 147 N. C., 195. The defendant's admission dispensed with proof that the notes had been executed but not with the necessity of introducing them in evidence. The record does not show that the judge "directed" or "requested" the defendant first to proceed; he "allowed" it, but at whose instance?

The question whether a witness whose deposition was taken by the plaintiff and offered by the defendant was a witness for the plaintiff was a subordinate feature of the trial concerning which no instruction was essential in the absence of a written request to that effect. *S. v. O'Neal,* 187 N. C., 22; *S. v. Merrick,* 171 N. C., 787.

No error.

JOHN A. NARRON v. HOLLEMAN CHEVROLET COMPANY AND GENERAL MOTORS ACCEPTANCE CORPORATION.

(Filed 11 October, 1933.)

1. **Sales I d—Where contract gives seller right to repossess without notice he may do so if repossession does not involve civil trespass.**

   Where the purchaser of an automobile signs a conditional sales contract stipulating that the seller or his assignee may repossess and sell the car without notice upon default in the payment of the purchase price according to the terms of the agreement, the seller or his assignee may exercise the right to repossess after default if repossession does not involve a civil trespass, but where the car is parked on a street by the purchaser and contains personal belongings of the purchaser, the repossession of the car without notice involves a civil trespass in the carrying away of such personal belongings of the purchaser.

2. **Damages D a—Seller repossessing car under terms of contract held not liable for punitive damages in action for civil trespass.**

   Where the assignee of a conditional sales contract signed by the purchaser of an automobile repossesses the car after default in the payment of the purchase price in accordance with the terms of the contract, but such repossession involves a civil trespass in that personal belongings of the purchaser were in the car at the time of the repossession, the purchaser in his suit for such trespass, although he may be entitled to compensatory damages, is not entitled to recover punitive damages.

APPEAL by General Motors Acceptance Corporation from *Frizzelle, J.*, at April Term, 1933, of JOHNSTON. New trial.

The plaintiff bought a Chevrolet sedan from the Holleman Chevrolet Company and executed a conditional sales contract, which was sold to the General Motors Acceptance Corporation as sole owner, reciting the total time price at $805.00, payable as follows: $300.00 on or before delivery, leaving a deferred balance of $505.00, to be paid in periodic installments of $43.00, the final installment being the remainder of the deferred balance. The plaintiff made default in payment and the Holleman Chevrolet Company, who had retained a key, had the car unlocked, the plaintiff having parked it on the street, and removed to its place of business. The defendants advertised the car for sale and the plaintiff obtained an order restraining the sale.

The cause came on for hearing and the jury returned the following verdict:

1. Did the defendant, General Motors Acceptance Corporation, wrongfully seize the car of the plaintiff, as alleged in the complaint? Answer: Yes.

2. What amount, if any, is the plaintiff entitled to recover as compensatory damages? Answer: $100.00.

3. What amount, if any, is the plaintiff entitled to recover as punitive damages?. Answer: $400.00.

4. In what amount, if any, is the plaintiff indebted to the defendant on the contract price of the automobile? Answer: $290.00 with interest from 24 December, 1931.

The court answered the fourth issue by consent. Judgment for plaintiff; appeal by General Motors Acceptance Corporation, the action having been dismissed as to the Holleman Chevrolet Company.

Winfield H. Lyon and Carroll W. Weathers for appellant.
Leon G. Stevens for appellee.

PER CURIAM. The conditional sales contract provided that title to the sedan should not pass to the purchaser until the contract price was fully paid in cash; that the assignee should be entitled to all the rights of seller; that in the event of default in the payment of any installment the whole amount should at the election of the seller immediately become due and payable; and that upon the purchaser's failure to comply with the terms of the contract the seller or any officer of the law might take possession of the property without demand and for this purpose might enter upon the premises and remove the property and resell it without notice to the purchaser or demand for performance.

We need not discuss the question whether in view of this contract the defendant's removal of the car would in itself have been wrongful in the sense contemplated by the first issue, for the reason that the judge instructed the jury that possession must be taken under circumstances which do not involve a civil trespass. The plaintiff testified that he had personal effects in the car when it was removed (although there is evidence to the contrary) and if they were carried away with the car without the purchaser's consent the taker committed a trespass which would sustain the answer to the first issue.

In reference to the second issue the court gave the following instruction, to which the defendant excepted: "The court instructs you that actual or compensatory damages are not confined to the pecuniary loss, such as loss of time or money, or both. The plaintiff may be confined to this if the jury so determine, but more than this is contained in the term; more than this is embraced in this issue. Where the facts and the nature of the action so warrant, actual or compensatory damages include all other damages than punitive; these embracing not only special damages as a direct pecuniary loss, but also physical pain and mental suffering and injury to the feelings."

Under the evidence in this case mental suffering and injury to the feelings cannot be considered as an element of damages. Nor does the evidence disclose any facts which justify an award for punitive damages.

New trial.

ELSIE POOL HORNE v. C. W. HORNE, ADMINISTRATOR OF ASHLEY HORNE, DECEASED, AND C. W. HORNE, INDIVIDUALLY.

(Filed 11 October, 1933.)

Appeal and Error A d—

An order denying a petition for the joinder of parties who are not necessary parties to the pending action is not reviewable and an appeal therefrom will be dismissed in the Supreme Court.

APPEAL by Farmers Bank of Clayton, Weisner Farmer, receiver of Nellie Horne McCullers, and C. A. Gosney, trustee in bankruptcy of C. W. Horne, and of Ashley Horne and Son, petitioners, from *Frizzelle, J.,* at April Term, 1933, of JOHNSTON. Dismissed.

This is an action to recover on a note for $20,000, executed by Ashley Horne and Son, and now owned by the plaintiff.

It is alleged in the complaint that at the date of the execution of the note sued on, Ashley Horne and Son, the maker, was a partnership, composed of Ashley Horne and C. W. Horne; that Ashley Horne is dead, and that C. W. Horne is his duly qualified administrator.

No answer to the complaint has been filed by the defendant, C. W. Horne, as administrator, or as an individual.

The Farmers Bank of Clayton is a judgment creditor of Nellie Horne McCullers, who is an heir at law and distributee of the estate of Ashley Horne, deceased; Weisner Farmer is the receiver of Nellie Horne McCullers, by appointment of the court in a supplementary proceeding in execution on the judgment in favor of the Farmers Bank of Clayton and against the said Nellie Horne McCullers; and C. A. Gosney is the trustee in bankruptcy of C. W. Horne, who is an heir at law and distributee of the estate of Ashley Horne, deceased, and also trustee in bankruptcy of Ashley Horne and Son.

The action was heard on petitions filed with the clerk of the Superior Court of Johnston County praying that the petitioners be made parties defendant in the action, and have leave to file answers to the complaint, setting up certain defenses to the cause of action alleged therein. The petitions were denied, and the petitioners appealed to the judge of the Superior Court of Johnston County.

At the hearing of the appeal, the order of the clerk was affirmed, and the petitioners appealed to the Supreme Court.

Winfield H. Lyon and E. J. Wellons for plaintiff.

Parker & Lee and Ruark & Ruark for C. A. Gosney, trustee.

Parker & Lee for Farmers Bank of Clayton, and Weisner Farmer, receiver.

PER CURIAM. Whether or not the petitioners are proper parties to the action, need not now be decided. They are at least not necessary parties, and for that reason, the order denying their petition is not subject to review by this Court. McIntosh N. C. Prac. & Proc., p. 185. *Byrd v. Byrd,* 117 N. C., 523, 23 S. E., 324. The appeal must be

Dismissed.

MISS ALMA LEE v. ROSE'S 5-10-25c STORES ET AL.

(Filed 11 October, 1933.)

Master and Servant F h—

Where the findings of the Industrial Commission, supported by evidence, are to the effect that a review of the award of compensation is sought by an employee more than twelve months from the date of the last payment, the order of the Commission denying further compensation will be upheld by the courts. N. C. Code, 8081(bbb).

CIVIL ACTION, before *Frizzelle, J.*, at June Term, 1933, of JOHNSTON.

The plaintiff was employed by the defendant as a clerk in August, 1928, and thereafter on or about 14 May, 1930, while she was engaged in cleaning out a candy case, it became necessary for her to lift heavy boxes of candy, and in doing so she sustained certain physical injuries. She stayed out from work ten or twelve days and returned to her duties. She was paid her full salary, and in addition a compensation check for four days' disability, was sent to her and duly endorsed. Thereafter she returned to the store and worked until 12 September, 1931, when she was discharged because she was unable to properly perform her duties. On 2 May, 1932, she filed notice with the Industrial Commission, asserting that there was a recurrence of disability, and that she was suffering severe and permanent injury.

The cause was heard by a commissioner, and upon denial of an award it was appealed to the full Commission. The full Commission affirmed the judgment of the hearing commissioner, and upon appeal to the Superior Court, there was judgment approving the "findings of fact, conclusions of law and award of the Industrial Commission."

From such judgment the plaintiff appealed.

Winfield H. Lyon for plaintiff.
Thomas A. Banks for defendant.

PER CURIAM. The hearing commissioner found that "the plaintiff in this case signed an agreement for compensation in 1930. Compensation was paid and the last payment was made on 19 July, 1930. The plaintiff claims to have notified the employer on 7 August, 1931, of the recurrence of the disability caused by the injury on 14 May, 1930. The first notice of a recurrence of disability was filed with the Industrial Commission on 2 May, 1932, or nearly two years after the final receipt was signed by the plaintiff."

Section 46 of the Workmen's Compensation Act, C. S., 8081(bbb), provides that "no review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this chapter."

There was competent evidence to support the findings of the Industrial Commission that the last payment of compensation was made on 19 July, 1930. The statute is plain and unambiguous, and no reason occurs why it should not be enforced according to the plain provisions.

Affirmed.

MAYSO POWELL ET AL. v. ARMOUR FERTILIZER WORKS ET AL.

(Filed 11 October, 1933.)

Guardian and Ward C b—

A guardian executed a note and deed of trust under an order made by the clerk without the approval of the judge. The judge later approved the order *nunc pro tunc. Held,* the defect was cured. C. S., 2180.

APPEAL by plaintiffs from *Barnhill, J.,* at Chambers, Rocky Mount, 18 March, 1933. From NASH.

Civil action by wards to have note and deed of trust signed by their guardian, under order of court, approved by the judge *nunc pro tunc,* declared null and void, heard upon facts agreed, which resulted in judgment of dismissal. Plaintiffs appeal.

A. O. Dickens, M. S. Strickland and Finch, Rand & Finch for plaintiffs.

Cooley & Bone for defendant, Fertilizer Works.

PER CURIAM. The judgment of the Superior Court is supported by the facts upon which it is agreed the rights of the parties depend.

The note and deed of trust were executed by the guardian pursuant to order of the clerk of the Superior Court, and before same was approved by the judge as required by C. S., 2180, but the judge's approval was later entered *nunc pro tunc.* This cured the defect. *Campbell v. Farley,* 158 N. C., 42, 73 S. E., 103. Compare *Mann v. Mann,* 176 N. C., 353, 97 S. E., 175.

Affirmed.

IN THE MATTER OF FRANK H. GIBBS, SUBSTITUTED TRUSTEE; W. O. BELL, MRS. C. O. PHELPS, AND W. N. BOYD, CLAIMANTS.

(Filed 11 October, 1933.)

Limitation of Actions E b—Statute of limitations need not be pleaded in proceeding in the nature of a controversy without action.

The requirement that the statute of limitations must be pleaded to be available, C. S., 405, applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale, C. S., 2592, 2593, the rights of the parties being determined in accordance with the admitted facts.

APPEAL by W. N. Boyd, claimant, from *Daniels, J.*, at Chambers. From WARREN.

Prior to 1890, John R. Boyd was the owner in fee of a certain tract of land in Warren County, North Carolina.

In the year 1890, the said John R. Boyd executed and delivered to W. B. Boyd, trustee, a certain deed of trust to secure an indebtedness due Martin Hill and Company, and Martin Son and Company: in the sum of $959.68. The said J. R. Boyd was in continuous actual possession of the tract of land described in the aforesaid deed of trust, and in all of the deeds of trust herein referred to, from a time prior to 1890 up to and until the time of his death in the year 1932. Subsequent to 1890, the claimant, W. N. Boyd became the holder in due course of the notes evidencing the indebtedness above described. In the year 1902, a payment of one dollar was endorsed on one of the said notes. There has been no payment since 1902; the debt evidenced by said notes remains unpaid. In 1918 John R. Boyd executed and delivered to W. G. Coleman a deed of trust embracing the same lands above mentioned; to secure an indebtedness due Coleman Brothers Company in the sum of $1,375; Mrs. C. O. Phelps holds the notes secured by said deed of trust, which notes are placed as collateral to note for $1,000 due W. O. Bell. There remains due and unpaid on the latter obligation the sum of $2,385. The last credit appearing on the notes of J. R. Boyd to Coleman Brothers Company was placed thereon in the year 1929. Both of the above deeds of trust are registered in the office of the register of deeds for Warren County as follows: The W. B. Boyd deed of trust in Book 54, page 769; the Coleman deed of trust in Book 99, page 261. John R. Boyd executed and delivered to H. A. Boyd, trustee, a certain deed of trust, on 31 January, 1889, recorded in the Warren registry, in Book 54, page 15, to secure an indebtedness due E. H. Riggan in the sum of $340.39. Frank H. Gibbs, substituted trustee, sold the land conveyed by the last mentioned deed of trust on 8 November, 1932, to one Mr. Wilson who paid the sum of $2,000 therefor which has been paid into the hands of the clerk of Superior Court. Mrs. C. O. Phelps, W. O. Bell and W. N. Boyd claim the said amount by virtue of the instruments above described.

Upon the foregoing facts the clerk of the Superior Court held that the claim of W. N. Boyd is barred by the statute of limitations and that W. O. Bell and Mrs. C. O. Phelps are the rightful owners of the fund, and on appeal Judge Daniels affirmed the judgment and ordered that the funds be paid to W. O. Bell and Mrs. Phelps as their respective interests may appear. W. N. Boyd excepted and appealed.

Julius Banzet and Frank Banzet for appellant.
Willis Smith and John H. Anderson, Jr., for appellees.

PER CURIAM. The appellant does not controvert the right of a junior mortgagee ordinarily to plead the statute against a senior mortgagee but he contends that the defense is not available here because not pleaded. *Guthrie v. Bacon,* 107 N. C., 337. Section 405 of the Consolidated Statutes applies to actions in which formal pleadings are filed. The present proceeding is in the nature of a controversy without action upon an agreed statement of facts for the distribution of a fund arising from the sale of real estate under a deed of trust. C. S., 2592, 2593. The rights of the parties are to be determined by the facts, and according to the facts the appellant's claim is clearly barred by the statute. C. S., 437, 2589. Judgment

Affirmed.

GREAT ATLANTIC AND PACIFIC TEA COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AS LIQUIDATING AGENT OF THE BANK OF BEAUFORT.

(Filed 1 November, 1933.)

1. **Banks and Banking H e—Complaint held insufficient to state cause of action for preference in insolvent bank's assets.**

Where in an action against the receiver of an insolvent bank to have plaintiff's claim declared a preference in the bank's assets, the complaint alleges that plaintiff purchased with cash the bank's check drawn on another bank, which check was not paid on account of the later insolvency of drawer bank, and the complaint does not allege that the check was a certified check or a cashier's check in the hands of a third person as a holder for value, or represented sums collected by the drawer bank and not paid: *Held,* defendant's demurrer is properly sustained, the complaint failing to allege facts sufficient to constitute the claim a preference either under the provisions of N. C. Code, 218(c) (14), or under the trust fund theory, and the allegations of the complaint that the claim constituted a preference may be disregarded on demurrer as a conclusion of law.

2. Pleadings D e—

A demurrer admits allegations of fact in the complaint but not inferences or conclusions of law therein.

APPEAL by defendant from *Grady, J.*, at June Term, 1933, of CARTERET. Reversed.

The allegations of the complaint of plaintiff, are as follows:

"1. That the Great Atlantic and Pacific Tea Company was, at all times mentioned, and is now, a corporation created, organized and existing under the laws of the State of Arizona, and during all of said times and is now engaged in the mercantile business in the State of North Carolina and elsewhere, with a branch store in Beaufort, Carteret County, North Carolina.

2. That the Bank of Beaufort was created, organized and existing under the banking laws of the State of North Carolina, with principal office in Beaufort, Carteret County, North Carolina, and before its suspension was engaged in general banking business at Beaufort, N. C.

3. That said Bank of Beaufort, on account of insolvency, suspended business on 15 September, 1931, and was taken over for liquidation by Gurney P. Hood, Commissioner of Banks of the State of North Carolina, and in accordance with the provisions of the banking laws of said State, said Hood, together with H. H. Taylor, former liquidating agent, and his successor, W. A. Allen, were at the times mentioned herein, and are now, in charge of the liquidation of the assets of said bank.

4. That on Saturday, 12 September, 1931, the plaintiff (through its local manager) at Beaufort, North Carolina, purchased over the counter from the Bank of Beaufort a check on the Hanover Bank of New York in the sum of $330.00 and on Monday, 14 September, 1931, it purchased a similar check in the sum of $254.58, and that on each occasion the cash was paid to the Bank of Beaufort for said checks. That the Bank of Beaufort closed its doors on Tuesday, 15 September, 1931, and the two checks aforesaid on the Hanover Bank of New York were turned down by said bank.

5. That the plaintiff is advised and informed and believes and so avers, that the amount of $584.58, representing the amount paid in cash by plaintiff to the Bank of Beaufort for the two New York checks aforesaid is a preferred lien on the assets of the Bank of Beaufort in the hands of the defendant; that said amount is a trust fund and it would be fraudulent and inequitable to permit the assets of the Bank of Beaufort to be increased and augmented for the benefit of the general creditors at the expense of this plaintiff.

6. That this plaintiff, in due time, and in proper form, filed with the defendant its claim for $584.58, being the amount paid in cash for the two New York checks, as a preference and lien on the assets of the Bank of Beaufort, in the hands of the defendant; and the defendant, while admitting the correctness of the amount, did, on 12 December, 1932, deny said claim of the plaintiff as a preference and lien on the assets of the Bank of Beaufort.

Wherefore, plaintiff demands judgment against the defendant as follows: (a) That its claim of $584.58 be declared a preference and a lien on the assets of the Bank of Beaufort in the hands of the defendant. (b) That the defendant be directed to approve said claim as a preference and to pay the same. (c) For costs and general relief."

The defendant demurred on the following grounds:

"1. That said complaint does not state facts sufficient to constitute a cause of action for a preference and lien on the assets of the Bank of Beaufort in the hands of the defendant Commissioner of Banks of the State of North Carolina, in that: (a) It appears upon the face of the complaint that plaintiff's claim is not within the purview of the preference statute controlling, to wit: Consolidated Statutes (Code, 1931), section 218(c), subsec. (14); no fact or circumstance being alleged to invoke said statute and/or the construction thereof by the Supreme Court of North Carolina; (b) It appears upon the face of the complaint that item claimed in preference is not 'collection,' certified or cashier's check in hands of third party for value; (c) Upon the face of the complaint no trust is declared sufficient to raise the application of principle of 'trace' or 'augmentation' of assets, or to avoid the application of the statute cited. Wherefore, order appropriate is prayed."

The judgment of the court below was as follows: "This cause coming on to be heard upon the complaint and defendant's demurrer, and the court being of the opinion, upon the allegations of the complaint, that a good cause of action is stated, and that upon the facts as alleged, if true, the plaintiff would be entitled to a preference—it is therefore, ordered and adjudged that the demurrer be overruled, and defendants are allowed 20 days to file answer, if so advised."

Defendant excepted, assigned errors and appealed to the Supreme Court.

T. C. Guthrie and Warren & Warren for plaintiff.
Julius F. Duncan for defendant.

CLARKSON, J. The question involved is succinctly set forth in the 4th paragraph of the complaint, as follows: "That on Saturday, 12 September, 1931, the plaintiff (through its local manager) at Beaufort, North Carolina, purchased over the counter from the Bank of Beaufort a check on the Hanover Bank of New York in the sum of $330.00 and on Monday, 14 September, 1931, it purchased a similar check in the sum of $254.58, and that on each occasion the cash was paid to the Bank of Beaufort for said checks. That the Bank of Beaufort closed its doors on Tuesday, 15 September, 1931, and the two checks aforesaid on the Hanover Bank of New York were turned down by said bank." In the distribution of the assets of the insolvent bank, is this a preference? We think not.

The statutory order of preference in distribution of the assets of an insolvent bank, is as follows: "The following shall be the order and preference in the distribution of the assets of any bank liquidation hereunder: (1) Taxes and fees due the Commissioner of Banks for examination or other services; (2) wages and salaries due officers and employees of the bank, for a period of not more than four months; (3) expenses of liquidation; (4) certified checks and cashier's checks in the hands of third party as a holder for value and amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank; (5) amounts due creditors other than stockholders," etc. N. C. Code of 1931 (Michie), section 218(c), part subsec. (14).

It will be observed that the complaint does not allege that the check was a "certified check" or "cashier's check in the hands of third party as a holder for value" or "amounts due on collections," etc., as contemplated by the statute.

The transaction is that of debtor and creditor. If it were otherwise in every transaction involving the relationship of debtor and creditor, near to a bank's going into liquidation on account of insolvency, it would be claimed a preference—thus destroying the well recognized maxim that "equality is equity."

Citing a wealth of authorities (where there is no statute), the principle is thus stated in *Standard Oil Co. v. Veigel* (Minn.), 219 N. W., p. 863 (864): "It is well settled that the purchase of a bank draft, a cashier's check or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and that the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased."

The matter is exhaustively discussed in *Harrison, receiver, v. Wright*, 100 Ind., 516, the headnote is as follows: "When properly filled out with the date, amount, the names of drawer and payee, the following is a banker's check: . . . 'Indianapolis, Ind., ..., 1883. No......... Pay to the order of......................, ... dollars. ...., cashier. To the United States National Bank, New York.' . . . Such a check, drawn upon the drawers' bank, without words of transfer, and drawn upon no particular designated fund, does not, of itself, either as between the drawer and drawee, or drawer and payee or holder of the check, operate as an appropriation or equitable assignment of a fund in the hands of the drawee. Nor does it operate as an assignment of a part of the drawee's chose in action against the drawee; and hence the holder of such a check is not entitled to a preference as against the depositors and general creditors of an insolvent drawer." At pp. 543-544 it is said: "Some of the checks were purchased with cash by persons who were not depositors with the bank; others by depositors giving their checks. The court below held that the checks purchased with cash should, for that reason, be paid in full, and that the other checks should share pro rata with the other debts. We can see no substantial reason for such a preference. If the depositors had withdrawn the amount from the bank, and with this purchased the checks, it might well be said that they purchased them with cash. Whether the checks were paid for in cash or by the checks, the bank in each case received the amount of them. . . . There is nothing in the case to create a superior equity in favor of the check-holders as against the depositors and other creditors. No fraud is charged or shown whereby the payees were induced to part with their money for the checks. They were purchased in the usual course of business. The assets of the bank will not pay its debts in full. The depositors deposited their money, relying upon the credit of the bank, that the amounts would be repaid to them when called for. The payees purchased the checks, relying upon the credit of the bank, that the amounts paid for them would be refunded if, for any cause, the checks should not be paid by the drawees. It is a case where equality among the creditors is equity." *Williams v. Hood, Comr.*, 204 N. C., 140; *In re Bank of Pender,* 204 N. C., 143; *Board of Education v. Hood, Comr.,* 204 N. C., 353; *Bassett v. West Haven Bk. & Tr. Co.* (Conn.), 165 Atl., 895.

The allegations in section 5 of the complaint is a conclusion of law. The demurrer to the plaintiff's pleading admits plaintiff's allegations of fact, but not inference or conclusions of law. *Phifer v. Berry,* 202 N. C., 388.

There seems to be a conflict of law in the different jurisdictions on the question involved in this action, but we believe the majority opinion is in conformity with the view we take. For the reasons given, the judgment in the court below is

Reversed.

L. E. McGEE, Administrator of HOWARD McGEE, v. W. M. CRAWFORD.

(Filed 1 November, 1933.)

1. **Automobiles D c—Rule for determination of whether driver is member of owner's family within meaning of "family car doctrine."**

   In determining whether a driver of an automobile is a member of the family of the owner of the car within the meaning of the "family car doctrine" the rule for determining the family relationship in actions to recover for services rendered a decedent may be applied: those living in the same household subject to the general management and control of the head thereof, and dependent on such supervising and managing head, and mutual gratuitous services with no intention on one hand of paying for such services and no expectation on the other hand of receiving compensation.

2. **Same—Held: evidence should have been submitted to jury on issue of whether driver was member of owner's family under "family car doctrine."**

   Plaintiff's intestate was killed while riding as a guest in a car driven by one of defendants and owned by the other defendant, the grandfather of the driver. There was evidence that the driver of the car had lived with his grandfather for two years and worked in his grandfather's store under an agreement that the grandfather was to furnish him board and lodging and one dollar a day, that the grandson had his own car and used his grandfather's family car for his own pleasure only on this occasion, and there was evidence by plaintiff that the grandson lived with his grandfather as a member of the family. *Held*, the evidence as to whether the grandson was a member of the grandfather's family within the purview of the "family car doctrine" was conflicting, and the issue, on the question of the grandfather's liability, should have been submitted to the jury under correct instructions from the court.

Civil action, before *Frizzelle, J.*, at June Term, 1933, of Harnett.

The evidence tended to show that M. C. Crawford, a young man about nineteen years of age, lived in the home of his grandfather, the defendant, W. M. Crawford, and that on or about 9 December, 1931, the said M. C. Crawford, in company with the deceased Howard McGee and two other young men, came to Raleigh. The deceased McGee and the said Crawford rode around the streets of Raleigh until the show was out. Crawford said: "We picked up a girl and rode around the streets of Raleigh until the show was out. . . . We brought the girl back to Angier with us in Johnson's car. Howard McGee introduced me to the girl. . . . We got back to Angier about twelve o'clock. . . . We had to arrange some way to take the girl back to Raleigh. I had a car of my own. I told Howard that we could take her back on that. We had to arrange some way to take the girl back home, and there wasn't any other car to be used except mine. We were going to use mine, but it was an open car and it was an awful cold night. I told Howard maybe I could get my grandfather's truck, which was closed, so we could take her back on that if we could borrow it, and if not, we would have to carry her back on my car. . . . I did not go in the house, but spoke loud enough to the ones in the room, my grandfather and my grandmother, to hear me, and asked could I use the truck to carry a girl home. My grandmother spoke and said if I would hurry back it would be all right. This was the only time after I bought my own car that I used the Ford pickup of W. M. Crawford. . . . The Ford pickup is a one-seated affair. All three of us got in that truck and went back to Raleigh to carry the girl home. My grandfather did not speak to me that night. Neither my grandfather nor grandmother had any interest in the girl. They did not know her. After we took the girl back home to Raleigh we started back to Angier. The accident happened on the way back. Howard McGee was riding in the seat beside me. . . . As I approached the scene of the accident I was traveling at around thirty-five miles an hour—not any over forty. . . . The car drifted off the side of the road and I lost control of it when it hit something. . . . I saw I had lost control, so I grabbed Howard and tried to hold him so he would not be jostling around, and then something, some tremendous jolt, jarred me loose from him, and then it was all over with. I imagine I endeavored to get hold of Howard McGee at the time I hit the bridge." After the wreck M. C. Crawford went to the home of a witness Stephenson to secure help. McGee was killed. and there was evidence tending to show that M. C. Crawford stated that he had dropped off to sleep and had a wreck.

The evidence further tended to show that the defendant, W. M. Crawford, was engaged in the mercantile business and was the grandfather of M. C. Crawford, the driver of the truck at the time of the killing. The evidence showed that the Ford pickup truck was used for delivering groceries and merchandise, and also, for the pleasure of the family of defendant, W. M. Crawford. There was evidence that for the last three to five years M. C. Crawford stayed at the home of his grandfather and worked in the store, and that the defendant, W. M. Crawford, exercised control over M. C. Crawford, "the same as a father to a son." There was evidence in behalf of defendant that the father and mother of M. C. Crawford were living at Erwin, Harnett County, and that he lived with his parents until 1929, when he went to work for his grandfather; that the grandfather had employed him to work in his store upon an express contract to pay a dollar a day for his services, and in addition, to furnish board and lodging, and that the said M. C. Crawford at the time of the accident, was an employee of his grandfather, W. M. Crawford.

The defendant in apt time tendered the following issue: "Was the said M. C. Crawford at the time of the injury complained of, a member of the family of W. M. Crawford, the defendant?" The court refused to submit such issue and the defendant excepted, and issues of negligence, contributory negligence and damages were submitted to the jury, and the verdict awarded the sum of $2,000 to the plaintiff.

From judgment upon the verdict the defendant appealed.

Dupree & Strickland for plaintiff.
A. J. Fletcher for defendant.

Brogden, J. Was M. C. Crawford a member of the family of his grandfather, W. M. Crawford, within the purview of the family purpose doctrine, imposing liability for automobile injuries?

It is conceded that if M. C. Crawford was a member of his grandfather's family and his grandfather kept the Ford truck for the combined purpose of "business and pleasure of the family" that the defendant would be liable for the negligence of his grandson. Upon the other hand, if the said M. C. Crawford was an employee of the defendant at the time and using the car exclusively for his own pleasure and purposes, then the defendant would not be liable to plaintiff's intestate.

This Court has heretofore undertaken to set forth the essential facts constituting the family relationship for purposes of determining the liability for services rendered. It is conceived that the same principle would apply to cases of the type involved in this appeal. In determining the question as to whether a grandchild could recover for services rendered a grandfather, this Court in *Dodson v. McAdams,* 96 N. C., 150, said: "It seems to be settled law—certainly in this State—that if a grandfather receives his grandchild or grandchildren into his family, and treats them as members thereof—as his own children—he and they are *in loco parentis et liberorum,* and hence, if the grandchild in such case shall do labor for the grandfather, as a son or daughter does ordinarily as a member of the family of his or her father, in that case, in the absence of any agreement to the contrary, no presumption of a promise on the part of the grandfather to pay the grandchild for his labor arises; the presumption is to the contrary. The grandchild, as to his labor or services so rendered in such case, is on the same footing as a son or daughter. And this is so, after the grandchild attains his majority, if the same family relation continues. This rule is founded, in large measure, upon the supposition that the father clothes, feeds, educates and supports the child, and that the latter labors and does appropriate service for the father and his family in return for such fatherly care, and domestic comfort and advantage. The family relation and the nature of the service, rebut the ordinary presumption that arises when labor is done for a party at his request, express or implied, of a promise on his part to pay for it. Applying this rule, this Court held in *Hussey v. Rountree,* 44 N. C., 111, that though a step-father is not bound to support his step-children, nor they to render him any service, yet if he support them, or they labor for him, in the absence of an express agreement, they will be deemed to have dealt with each other as parent and child and not as strangers." The same principle applies to grandfather and grandchild. *Hudson v. Lutz,* 50 N. C., 217. See *Henderson v. McLain,* 146 N. C., 329, 59 S. E., 873.

The term "family" is an elastic expression and must necessarily vary with given facts and circumstances, but the description of the relationship given by our Court, *supra,* implies: (1) those who live in the same household, subject to the general management and control of the head thereof; (2) dependence of the members upon such supervising, controlling and managing head; (3) mutual gratuitous services with no intention on one hand of paying for such services, and no expectation on the other of receiving reward or compensation.

Applying the principle of law to the facts, it appears that M. C. Crawford had his own car, and that for two years or more he had lived in the home of his grandfather and worked in the grandfather's store. He borrowed a truck belonging to the defendant for his own purposes and pleasure. The plaintiff offered testimony tending to show that the grandson lived in the home of the grandfather as a member of the family. The testimony of defendant tends to show that the grandson was an employee of his grandfather, and that such employment was based upon contract providing a stipulated sum in money per week, and in addition thereto, board and lodging in the grandfather's home.

This Court has never extended the family purpose doctrine to mere employees, and certainly the facts in this case do not warrant an expansion of the principle. Family membership was essential to liability in the case at bar, and as the evidence upon the point was conflicting, the issue with respect thereto, tendered by the defendant, should be submitted to the jury with proper instructions from the court. See *Smith v. Callaghan,* 64 A. L. R., 830, and *Watson v. Burley,* 64 A. L. R., 839, and annotation.

New trial.

WESTERN CAROLINA POWER COMPANY v. RUSSELL M. YOUNT AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 1 November, 1933.)

Principal and Surety B c: Creditors' Bill A b—Held: Summary proceeding under C. S., 356 should have been consolidated with creditors' bill.

Plaintiff instituted summary proceedings under C. S., 356, against the clerk of the Superior Court and the surety on his bond to recover for the clerk's default in failing to return to plaintiff, as ordered by the Superior Court, moneys deposited with the clerk. Notice and complaint in the proceeding were served on defendants 2 September, 1933. Another creditor of the clerk instituted suit against the clerk on 2 September, 1933, in her own behalf and in behalf of all persons similarly situated, who wished to make themselves parties, and decree was entered in the suit 9 September, 1933, appointing a permanent receiver for the clerk, authorizing the receiver to bring suit on the clerk's bonds, and enjoining all creditors of the clerk from instituting any other suit or action against him or on his bonds. In the summary proceeding under C. S., 356, the surety on the clerk's bond pleaded the decree of 9 September in bar to plaintiff's right to judgment, and the trial court dismissed the summary proceeding. *Held*, the summary proceeding should have been consolidated with the suit in the nature of a general creditor's bill, and the order of the trial court dismissing the summary proceeding is reversed.

STACY, C. J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Warlick, J.*, at September Term, 1933, of CATAWBA. Reversed.

This is an appeal by the plaintiff, Western Carolina Power Company, from an order of his Honor, Wilson Warlick, judge presiding at the September Term of the Superior Court of Catawba County, denying the plaintiff's motion for judgment, and dismissing plaintiff's summary proceeding instituted in the manner provided by C. S., 356, against the defendant Russell M. Yount, former clerk of the Superior Court of Catawba County and the United States Fidelity and Guaranty Company, as surety on his official bond.

Plaintiff deposited with Yount, clerk of the Superior Court of Catawba County, on 14 September, 1927, $21,300, being the amount awarded by the commissioners in three condemnation proceedings which the plaintiff had instituted in that county. On appeal from the award of the commissioners in the condemnation cases, judgment was rendered against the plaintiff for a larger amount, which judgment has been duly paid by the plaintiff; and, on 13 July, 1933, his Honor, Wilson Warlick, judge presiding, entered an order directing the clerk to return to the Western Carolina Power Company the original deposit of $21,300. On the Power Company's demand, the clerk repaid $3,300, but failed to pay the balance of $18,000.

On 1 September, 1933, plaintiff instituted this proceeding under C. S., 356, to recover judgment against the clerk and the United States Fidelity and Guaranty Company, the surety on his official bond. Due notice was given the clerk and the surety on his bond, and the motion for judgment duly came on for hearing at the September Term of the Superior Court of Catawba County on 14 September, 1933.

On 2 September, 1933, Mrs. J. B. Robinette instituted a suit in the Superior Court of Catawba County against Russell M. Yount (but not against the surety on his official bond), asking for the appointment of a receiver. Temporary receivers were appointed on 2 September, and on 9 September their appointment was made permanent.

The order appointing permanent receivers contained the following provisions: "It is further ordered, adjudged and decreed that all persons, firms or corporations, including sheriffs and marshals and their officers, agents, attorneys, representatives, servants and employees, whether creditors or claiming to be creditors, or having or claiming to have any right, title or interest of, in and to any property or properties of the defendant, "or claiming or alleging any right or interest or any right of action upon his official bonds as clerk" (the portion in quotations was added on 14 September amending the order of 9 September), be, and they are, hereby enjoined and restrained from instituting or prosecuting or continuing the prosecution of any action at law, or action or proceeding in equity against the defendant in any court of law or equity, or from executing or issuing out of any court of any writ, process, summons, attachment, subpœna, replevin or any other proceeding for the purpose of impounding or taking the possession of or interfering with any property owned by or in the possession of the said defendant or the said receivers, or owned by the said defendant and in the possession of any officers, agents, servants, or representatives of the said defendant. . . . Said receivers are fully authorized and empowered to institute and prosecute an action or actions, summary or otherwise, against the United States Fidelity and Guaranty Company, surety upon the defendant's first and second bonds as clerk of the Superior Court and upon all claims and demands arising thereunder by reason of any and all defaults, demands, and other liabilities, against said defendant."

The defendant, United States Fidelity and Guaranty Company, after admitting and denying certain allegations of the complaint, set up a further answer as follows: "This defendant says that on 9 September, 1933, in an action entitled: 'Mrs. J. B. (Edna) Robinette, in behalf of herself and all other persons in similar situation, who may see fit to come in and make themselves parties to this action, *v.* Russell M. Yount, individually, and ex-clerk of the Superior Court of Catawba County'—instituted in the Superior Court of Catawba County, Clarence Clapp and J. C. Rudisill were appointed permanent receivers of the assets, properties, goods, chattels, real estate, notes, securities or other evidences of debt, books, official records, audits, moneys in bank, etc., of Russell M. Yount, individually, and as ex-clerk of the Superior Court of Catawba County, and in said order, all creditors of the said Russell M. Yount were enjoined and restrained from instituting or prosecuting or continuing the prosecution of any act at law, or action or proceeding in equity against the defendant in any court of law, the object of said proceeding being for the purpose of paying all creditors ratably and without preferences; that by virtue of said order to which reference is hereby made as fully as if herein written, this action should be consolidated with the action hereinbefore referred to, instituted by Mrs. J. B. Robinette, or dismissed."

The court below made the following order:

"This proceeding came on to be heard before his Honor, Wilson Warlick, judge presiding, at this the September Term, 1933, of the Superior Court of Catawba County, upon motion of the Western Carolina Power Company, for judgment against the defendants, pursuant to the notice and complaint heretofore duly served on said defendants. The notice and complaint in summary proceeding, under section 356 of the Consolidated Statutes of North Carolina, heretofore filed in this proceeding, were duly served on the defendants on 2 September, 1933. The United States Fidelity and Guaranty Company filed its answer, as the same appears of record, on 12 September, 1933; the defendant Yount has filed no answer.

The defendant, United States Fidelity and Guaranty Company pleaded in bar of the motion of the Western Carolina Power Company, and in bar of its right to a judgment, the decree dated 9 September, 1933, made and entered by this Court in the case of Mrs. J. B. (Edna) Robinette, in behalf of herself and all other persons in similar situation, who may see fit to come in and make themselves parties to this action, versus Russell M. Yount, individually and as ex-clerk of the Superior Court of Catawba County, appointing permanent receivers in said action.

The said Mrs. J. B. Robinette and the receivers objected to the motion of the Western Carolina Power Company.

Upon consideration of the record in said receivership suit of Mrs. Robinette against Russell M. Yount, the court is of the opinion that the decree made in said suit bars the plaintiff from proceeding further in this proceeding.

It is therefore, ordered and adjudged that plaintiff's motion be, and same hereby is denied, and that this proceeding be, and the same hereby is dismissed."

The plaintiff appealed to the Supreme Court, and made the following assignment of error: "The plaintiff assigns as error the ruling of the court that the decree made in said Robinette suit bars the plaintiff from proceeding further in this proceeding and the order of the court in denying the plaintiff's motion and dismissing this proceeding."

Self, Bagby, Aiken & Patrick, W. B. McGuire, Jr., and W. S. O'B. Robinson, Jr., for plaintiff.

Rendleman & Rendleman for U. S. Fidelity and Guaranty Company, defendant.

J. L. Murphy, T. P. Pruitt and E. B. Cline for Mrs. J. B. Robinette and the receivers.

CLARKSON, J. The United States Fidelity and Guaranty Company, defendant in the above entitled summary proceeding, in its answer to the complaint of the plaintiff, prayed that "this action should be consolidated with the action heretofore referred to, instituted by Mrs. J. B. Robinette, or dismissed." We think the action, or summary proceeding, should have been consolidated and not dismissed, under the facts and circumstances of this case.

In N. C. Practice & Procedure in Civil Cases (McIntosh), at p. 536-7, part section 506, is the following: "A consolidation is the opposite of a severance, and consists in combining two or more actions into one for trial. While there is no statute regulating it, the power is recognized and frequently exercised by the courts. 'The object of consolidating two or more actions is to avoid a multiplicity of suits, to guard against oppression or abuse, to prevent delay, and especially to save unnecessary cost or expense; in short, the attainment of justice with the least expense and vexation to the parties litigant. Consolidation, however, is improper, where the conduct of the cause will be embarrassed, or complications or prejudice will result, which will injuriously affect the rights of the parties.' " At p. 538, part section 507, we find: "Where several actions were brought by different creditors to set aside a fraudulent conveyance and to reach the property of the common debtor, and there was a conflict as to the rights of the creditors in the property, or the court appointed a receiver to take charge of the property, an order was made to consolidate the actions into a general creditor's suit, preserving the priorities or preferences which each creditor had acquired; and the same practice was followed in actions by creditors against an insolvent corporation. This could be considered as combining all the actions into one, a general creditor's suit in which all might have united in the beginning, or as a combination of judgment creditor's suits in which the rights of each creditor is preserved. Where an action was brought to set aside a deed to land for fraud, a second action for the possession of the land, and a third for the allotment of dower in the land, a consolidation was ordered, so that all the rights could be adjusted at one time."

This was a summary proceeding, under C. S., 356, against the clerk of the Superior Court of Catawba County, and defendant United States Fidelity and Guaranty Company, his bondsmen. The plaintiff relies chiefly on *S. v. Gant,* 201 N. C., 211. We think that case distinguishable from the present one. The judgment of the court below is

Reversed.

STACY, C. J., took no part in the consideration or decision of this case.

MRS. REID P. LYON v. W. H. LYON.

(Filed 1 November, 1933.)

Automobiles E b—Husband held not liable for injury to wife driving family car for defective condition of car in absence of knowledge of defect.

Where a husband owns an automobile for family use and the wife sustains a personal injury while driving upon a highway, and brings action against her husband for damages, alleging his failure to inspect the car and not keeping it in a safe and suitable condition as the cause of the injury she has sustained, a demurrer to the complaint is properly sustained in the absence of allegation that the husband knew of the defective condition and failed to warn his wife, their relation in this respect being analogous to that of principal and agent or master and servant, the latter having the same opportunity of discovering the defect before using the car.

APPEAL by plaintiff from *Grady, J.,* at March Term, 1933, of JOHNSTON. Affirmed.

The plaintiff in this action is now and was on 5 May, 1932, the wife of the defendant. She and the defendant are now and were on said day residents of the town of Smithfield, in Johnston County, North Carolina.

In her complaint, as the cause of action on which she seeks to recover of the defendant, the plaintiff alleges:

"3. That on 5 May, 1932, and for some time prior thereto, the defendant was the owner of a Buick automobile, which he maintained and kept for the pleasure of the plaintiff and other members of their family and friends, to be used by the plaintiff whenever she desired the same.

4. That on 5 May, 1932, the defendant placed the said Buick automobile for the use of plaintiff and one of her friends in making a trip from the town of Smithfield to the city of Raleigh. That plaintiff was proceeding along in said automobile and operating the same in a careful and prudent manner, on State Highway No. 10, and when about two miles south of the city of Raleigh, at about 11 o'clock in the day time, the tire on the right-hand rear wheel of said automobile punctured, and plaintiff immediately attempted to stop the said automobile.

5. That immediately upon ascertaining that the tire on said automobile had become flat, and that it was necessary that the automobile be stopped, and the tire changed, the plaintiff promptly attempted to apply the brakes and to bring the automobile to a full stop; that shortly after it became flat, the said tire, as plaintiff now believes, either came off of the wheel, or the wheel locked, or something wrong happened, and when she attempted to apply the brakes and stop said automobile, the

brakes failed to work properly, and they did not check the speed of said automobile. That at the time said tire became flat, and the plaintiff realized that immediate repairs to or change of said tire were necessary, the said automobile was proceeding along on the right-hand side of the road, at a reasonable rate of speed, and with due care, but directly after the said tire became flat, and it was apparent to her that the brakes were not in proper working condition, and that she could not stop said automobile, and that the mechanical condition of said automobile was such that she could not control the same, she endeavored to keep said automobile on the right-hand side of the road, but on account of the negligent condition of said automobile, when the brakes failed to check its speed, it ran for some distance until its momentum was such that it suddenly lurched from one side of the road to the other, and as she now believes, one or more of the wheels locked, or the steering gear became out of adjustment to such extent that she was in a moving automobile, which was in such negligent mechanical condition that she was powerless to control the same, and that said automobile finally ran off a high embankment, on the right-hand side of the highway and turned over, and that on account of the negligence of the defendant, plaintiff was seriously and painfully injured and damaged."

The plaintiff further alleges that she was injured and damaged by the negligence of the defendant, "for that he negligently maintained and placed at the use and disposal of the plaintiff, and for her pleasure, a family automobile, and instead of constantly inspecting and repairing said automobile, and keeping it in a safe and suitable condition for the pleasure and convenient use of plaintiff, the said defendant negligently failed to have the said automobile inspected from time to time and to know that it was in proper mechanical condition and safe for use; and for that the defendant negligently failed to equip said automobile with proper tires, tubes and rims; and in that he negligently maintained and used upon said automobile an old tire, tube and rim herein specifically complained of; and for that the defendant negligently failed to have said automobile equipped and maintained with safe and adequate brakes, so that said automobile could be controlled by same; and for that the defendant negligently failed to keep the wheels, steering gear, and other mechanical parts of said automobile in such condition for use, so that the said automobile could be properly controlled, instead of same lurching from one side of the road to the other, and rendering the occupants of said automobile utterly helpless; and for that the defendant negligently placed in the hands of the plaintiff a family automobile, for her pleasure, and said automobile at the time herein complained of, as the plaintiff is now advised, informed and believes, was in such negligent condition that it was a menace to the life and limbs of the plaintiff, and an unfit, unsafe and highly dangerous instrumentality and unsuited for use, and by reason of the negligence of the defendant as aforesaid, the plaintiff has been seriously and painfully injured to her great damage, to wit, in the sum of $25,000."

The defendant, in apt time, demurred to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action, for that:

"(a) The complaint does not allege any legal duty or obligation on the part of the defendant to furnish or provide for plaintiff any automobile, or the particular automobile referred to, either generally or at the particular time referred to in the complaint;

(b) It is not alleged in the complaint that the alleged defects in said automobile existed at the time when the defendant gave to the plaintiff permission, and when plaintiff, pursuant to such permission, took and began to use the same, and/or that at said time defendant had actual knowledge of the defects complained of and failed to notify or warn plaintiff of the same."

The demurrer was sustained and the action dismissed. The plaintiff appealed to the Supreme Court.

F. H. Brooks for plaintiff.
Ruark & Ruark for defendant.

CONNOR, J. It is well settled as the law in this State that where a husband owns an automobile, which he keeps and maintains for use by his wife for her pleasure, and the wife while driving the automobile, by her negligence causes injuries to a third person, such person may recover of the husband damages for his injuries. *Goss v. Williams,* 196 N. C., 213, 145 S. E., 169. In the opinion in that case, it is said that in contemplation of law the negligence of the wife is imputed to the husband. In such case, the liability of the husband to the injured person is predicated upon the principle of *respondeat superior.* The wife, as the driver of the automobile, is the representative of the husband, and although she is driving the automobile for her pleasure, is engaged in his business, while driving the automobile for the purposes of its ownership. The relationship between the husband and the wife, with respect to the automobile, is analogous to that of master and servant, or principal and agent, and not that of bailor and bailee. The liability of the husband to the third person who was injured by the negligence of the wife, arises out of his relationship to her, with respect to the automobile, which she was driving at the time of the injury. This relationship is said to be that of master and servant, or principal and agent. The so-called "family purpose doctrine," which is recognized and applied in this State for the protection of third persons, is founded upon this principle.

In the instant case, the wife while driving the automobile which was owned by her husband and kept by him for her use and for her pleasure, suffered personal injuries, which it is alleged were caused by the defective condition of the automobile. In the absence of allegations that the husband knew of such condition, and with such knowledge failed to warn his wife of the danger of using the automobile, and of further allegations that the wife did not know and could not by reasonable inspection have discovered such defects, no cause of action is alleged in the complaint. See *Plasikowski v. Arbus,* 92 Conn., 556, 103 Atl., 642, L. R. A., 1918E, 415. In that case it is held that an employer is under no duty to warn an employee of dangers which are obvious, or to instruct him with respect to matters which he may fairly be supposed to understand. This principle of law was applied in that case, where it was held that a chauffeur could not recover of his employer damages for personal injuries suffered by him as the result of the defective condition of the automobile which he was driving for his employer. In the instant case, a fair interpretation of the allegations of the complaint justify an application of this principle. On the facts alleged in the complaint, the plaintiff had equal if not greater opportunities to discover the alleged defects in the automobile as the defendant. If the defects were not obvious and could not have been discovered by the plaintiff, upon a reasonable inspection of the automobile, before the accident, then it follows that they could not have been discovered by the defendant upon such inspection. There is no error in the judgment.

Affirmed.

MINNIE BAKER, ADMINISTRATRIX, ET AL., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 November, 1933.)

1. **Railroads D d—Driver falling asleep and running car into pier of underpass held not entitled to recover of railroad company.**

   The evidence tended to show that the driver of an automobile fell asleep and ran his car into a concrete pillar supporting a railroad trestle over a highway underpass, and that there was a distance of 10½ or 11 feet on either side of the concrete pillar for the passage of traffic. *Held,* the driver may not recover from the railroad company for injuries resulting to him from the accident.

2. **Automobiles C j—Negligence of driver in running car into pier of underpass held to bar recovery against railroad by guest's administrator.**

The evidence tended to show that concrete pillars were constructed to support a railroad trestle over a highway underpass, that the center pillar stood in the middle of the highway with a distance of 10½ or 11 feet on either side for the passage of traffic, that the pillar had reflectors placed on it by the State Highway Commission, that the Highway Commission had approved the plans for the underpass, and that the driver of a car in which plaintiff's intestate was riding as a guest, fell asleep and ran the car into the pillar, resulting in the death of plaintiff's intestate. *Held*, the negligence of the driver was active, while the negligence of the railroad company, if any, in the construction of the underpass was passive, and the driver's negligence *is held* to be the sole proximate cause of the accident barring a recovery against the railroad company for the guest's death, and rendering it unnecessary to decide whether defendant railroad company could be held liable for negligent construction of the underpass in view of its approval by the State Highway Commission.

3. **Pleadings G c—**

An allegation that the negligence of defendant railroad company in maintaining an underpass in an unsafe condition was "wanton" is a mere conclusion of the pleader.

4. **Appeal and Error J g—**

Where actions are correctly nonsuited, other exceptions of record need not be considered.

APPEAL by plaintiffs from *Grady, J.*, at May Term, 1933, of PITT.

Civil actions by owner and driver of automobile and administratrix of invited guest to recover damages (1) for injuries sustained by owner and driver, and (2) for death of invited guest, both alleged to have been caused by the wrongful act, neglect or default of the defendant, and as the two causes of action arose out of the same collision or the same state of facts, for convenience, they were consolidated and tried together. *Fleming v. Holleman*, 190 N. C., 449, 130 S. E., 171.

The determinative facts are these: State Highway No. 90 passes under the tracks of the defendant railroad just west of the town of Williamston, this State. In 1923, pursuant to plans approved by the State Highway Commission, the defendant reconstructed or rebuilt this underpass, or the trestle over the hard-surfaced road, and, in doing so, erected center piers, of two or three feet in width, for the support of its track or trestle, leaving a driveway on either side of 10½ or 11 feet. The roadway is approximately 24 feet wide for a distance of about 96 feet before reaching the underpass. The center piers or posts are not lighted, though they are equipped with reflectors, placed upon them by the State Highway Commission.

On the night of 4 August, 1929, about 12:30 a.m., the plaintiff, Jacob C. Williams, was driving his Ford automobile along said highway, with Heber C. Baker, an invited guest, sitting on the front seat with him. Just before reaching said underpass, Williams fell asleep and ran his automobile into the center column, injuring himself and his car and killing his guest. He testified that he "dozed off" or "fell asleep temporarily" at a point 200 or 300 feet from the underpass, and "when I last remember driving before I fell asleep, I was driving about 35 miles per hour." He further said that he saw the lights of Williamston before he "went to sleep, and was entirely familiar with the route." He could not say whether the deceased was asleep or saw him sleeping.

Upon these, the facts chiefly pertinent, the actions were dismissed as in cases of nonsuit, and from the judgments entered, the plaintiffs appeal, assigning errors.

Julius Brown for plaintiffs.

Thomas W. Davis, V. E. Phelps and MacLean & Rodman for defendant.

STACY, C. J. That the driver of the automobile, who fell asleep and ran his car into the center post, injuring himself and killing his companion, cannot recover is too plain for debate. *Blood v. Adams,* 169 N. E. (Mass.), 412; *Potz v. Williams,* 155 Atl. (Conn.), 211. He was not driving along a street which abruptly terminated in a river without barricade or lights as was the case in *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286. Nor was he unfamiliar with the road. There are none so blind as those who have eyes and will not see. *Furst v. Merritt,* 190 N. C., 397, 130 S. E., 40. The law is not able to help him. *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598.

It is equally clear, we think, that the negligence of the driver was the sole, proximate cause of plaintiff's intestate's death. *Hinnant v. R. R.*, 202 N. C., 489, 163 S. E., 555; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361.

Such was the holding of the Louisiana Court of Appeal, *Becker v. Ill. Cent. R. Co.,* 147 So., 378, on a state of facts identical in principle with those of the present case, where *Janiver, J.,* delivering the opinion of the Court, took occasion to say:

"It must be conceded that, if there had been no center pier there could have been no collision therewith, but it does not follow that, because there was a pier, its presence can be said to have been the proximate cause of the collision. It might as well be said that, had the truck not been manufactured, it could not have run into the pier, and that therefore the manufacturers, because they made the truck, are chargeable with the accident.

"There must be overhead trestles, and there must be other obstructions near highways without which all such highways would of course, be more safe. If all roads could be absolutely straight and could be built without any structures of any kind on or near them, of course there would be fewer accidents, but it does not follow that those who build roads with curves in them, or those who maintain necessary objects near them, are liable for all accidents in which such curves or such obstructions are remotely concerned. That the mere fact that the roadway would be safer without such piers does not render a railroad owning such piers liable was held in a case closely resembling this, *Tennessee Central Railway Co. v. Hancock's Administratrix,* 245 Ky., 426, 53 S. W. (2d), 708, 710, in which the Court said: 'Measuring the duty as of the time of the accident, it is difficult to perceive any negligence on the part of the defendant to have been established. The condition disclosed in the record was not intrinsically dangerous or hazardous. The space between the piers was practically the same as the paved surface of the highway. The approach to it was not abrupt or sudden. The situation was visible for such a distance as would enable any one traveling at a reasonable rate of speed to bring his car to a complete stop if that should become necessary. The railroad company has but exercised its legal powers, and does not appear from this record to have violated any duty in erecting or maintaining the viaduct, or in meeting the requirements which ordinary use of the highway by those exercising due care for their own safety and security demands, although perhaps the highway may be less safe at the point than it would if there were no railroad crossing there. The mere occurrence of an unfortunate accident at the place is not sufficient to require the payment of damages by the railroad company. The Court is of the opinion that the verdict is flagrantly against the evidence.'

"The question to be determined is whether the obstruction proximately caused the accident, or whether the cause was some independent, intervening act of some one else, which act, in the eyes of the law, was the actual or proximate cause. . . .

"We may likewise say here that granting that the railroad company was negligent in permitting the pier to be erected in the highway (which cannot be granted as a matter of fact), could it be reasonably apprehended or foreseen that a person would approach in an automobile without maintaining the slightest lookout ahead? It is not to be presumed that a person will operate an automobile without looking ahead any more than it is to be presumed that a person will operate one at a speed in excess of legal limits. If, in the one case, the reckless speed is the proximate cause of the accident and the obstruction only incidental, why cannot it be said in the other that the failure to look is the proximate cause and the obstruction merely incidental?"

The conclusions reached by the Louisiana Court are supported by our own decisions, *Hinnant v. R. R., supra, Herman v. R. R., supra,* as well as by those of other jurisdictions. *Davis, Agent, v. Schroeder,* 291 F., 47; *Pugh v. City of Cattleburg,* 214 Ky., 312, 283 S. W., 89; *Lind v. Great Northern Ry. Co.,* 214 N. W. (Minn.), 763.

Whether the defendant could be held liable for negligent construction of the underpass, in view of its approval of the State Highway Commission, we make no definite ruling, as it is unnecessary to do so on the present record. In any event, the negligence of the defendant, if any, was only passive, while that of the driver of the automobile was active, and must be regarded as the sole, proximate cause of plaintiff's intestate's death. *Brigman v. Const. Co.,* 192 N. C., 791, 136 S. E., 125. The allegation that the negligence of the defendant in constructing and maintaining said underpass in an unlawful manner was "wanton" is but a conclusion of the pleader or a mere *brutum fulmen. Andrews v. R. R.,* 200 N. C., 483, 157 S. E., 431.

There are other exceptions appearing on the record, but as the actions were properly dismissed as in cases of nonsuit, they are not regarded as material, but are moot, hence not determined.

Affirmed.

IN RE BANK OF SAMPSON.

(Filed 1 November, 1933.)

1. **Set-Off A b—**

   As a general rule, joint and separate debts, or debts accruing in different rights, are not allowed to be set off against each other, due to want of mutuality.

2. **Banks and Banking H d — Partnership account may not be set off against debt due insolvent bank by member of partnership.**

   A partnership deposit may not be set off against a debt due the bank by one of the partners upon demand of both partners made after the insolvency of the bank, the demand being in effect an assignment of the deposit after insolvency, entitling the assignee only to a pro rata distribution in the bank's assets.

3. **Same—Unexercised license to bank cashier to charge partner's debt to partnership account held not to affect right to set-off.**

   The fact that the cashier of a bank is given license to charge a debt due the bank by a member of a partnership to the partnership account at any time does not affect the rule that after insolvency of the bank the partnership account may not be used as an off-set against one partner's debt to the bank, the license not having been exercised while the cashier had authority to act.

APPEAL by petitioners from *Harris, J.,* at March Term, 1933, of SAMPSON.

Petition filed in insolvent bank liquidation by partners to set off partnership deposit against individual indebtedness of one of the partners.

The petition was heard by the court, without the intervention of a jury, upon facts agreed or found without objection:

1. That Bank of Sampson, a State banking corporation, was placed in the hands of the defendant as liquidating agent, on account of insolvency, 22 June, 1931.

2. The Clinton Hardware Company, a solvent partnership composed of R. H. and H. J. Hubbard, both of whom are also solvent, had on deposit with said bank at the time of its closing the sum of $454.98.

3. One of the partners, R. H. Hubbard, is indebted to the Bank of Sampson, by note given long before its insolvency, in the sum of $500. At the time of the original execution of said note (subsequently renewed from time to time), "R. H. Hubbard gave the cashier of the bank license to charge the note to the partnership deposit any time the bank should need the money, by making the following statement to the cashier: 'At any time the bank needs the money, you can draw on the partnership account at the bank and pay the note.' The other partner, H. J. Hubbard, was aware of the above license to charge the note to the partnership deposit."

4. At various times while this note, or a renewal thereof, was outstanding, the credit balance of the partnership deposit fell below the amount of said note, and at one time was overdrawn, but the average balance was more than the amount of said note.

5. Both members of the partnership firm have demanded that the partnership deposit of $454.98 be set off against the individual indebtedness of R. H. Hubbard represented by the $500 note.

The court being of opinion that the petitioners are not entitled to the set-off demanded, dismissed the petition, and they appeal.

Cyrus M. Faircloth and H. H. Hubbard for petitioners.
J. D. Johnson, Jr., and C. I. Taylor for respondent.

STACY, C. J. Depositors who are also borrowers are allowed to set off their deposits in closed banks against their obligations to said banks, because both claims exist between the same parties and in the same right. *In re Bank,* 204 N. C., 472, 168 S. E., 676; *Coburn v. Carstarphen,* 194 N. C., 368, 139 S. E., 596; *Williams v. Coleman,* 190 N. C., 368, 129 S. E., 818; *Davis v. Mfg. Co.,* 114 N. C., 321, 19 S. E., 371; Note, 25 A. L. R., 938; 3 R. C. L., 529; 7 C. J., 745. But this is as far as the doctrine of set-off has been applied in the liquidation of insolvent banks. *Indemnity Co. v. Corp. Com.,* 197 N. C., 562, 150 S. E., 16; 7 C. J., 658.

Ordinarily, a partnership account may not be set off against the individual indebtedness of one of the partners even as between solvent debtors and creditors, because of the absence of mutuality. *Hodgin v. Bank,* 124 N. C., 540, 32 S. E., 887; *Strauss v. Frederick,* 91 N. C., 121. *A fortiori,* such set-off would not be available after insolvency when the rights of third parties have intervened. 34 Cyc., 736-737; 57 C. J., 464. Mutuality is essential to set-off. *Dameron v. Carpenter,* 190 N. C., 595, 130 S. E., 328; *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320. "Such right of set-off only exists between the same parties and in the same right." *Adams v. Bank,* 113 N. C., 332, 18 S. E., 513. "Where the debts are not due to and from the same persons in the same capacity the right of set-off does not exist." 7 C. J., 745.

In *Cotton v. Evans,* 21 N. C., 284, suit was brought against a partnership firm by assignee of insolvent creditor. The defendant sought to set off an individual claim of one of the partners against the assignor: *Held* that such a set-off was not good against the claim of the assignee where there had been an assignment to bona fide creditors.

As a general rule, joint and separate debts, or debts accruing in different rights, are not allowed to be set off against each other, due to want of mutuality. 34 Cyc., 727; 57 C. J., 462. The practice may be otherwise in Pennsylvania, *Montz v. Morris,* 89 Pa., 392, and Maine, *Collins v. Campbell,* 97 Me., 23, 53 A., 837, 94 A. S. R., 458.

Speaking to the identical question, here presented, in *Fralick v. Coeur D'Alene Bank & Trust Co.,* 35 Idaho, 749, 208 Pac., 835, 27 A. L. R., 110, *Budge, J.,* delivering the opinion of the Court, said:

"We are of the opinion that the court was right in holding that the deposit which stood to the credit of the firm of Reed and Boughton could not be set off against the individual indebtedness of either Reed or Boughton, by the special deputy. We think the rule to be as stated in the case of *Re Van Allen,* 37 Barb., 225, at 230, 231: 'Where the debts are not due to and from the same persons in the same capacity, the right of set-off does not exist. Therefore, where, on the one side, the debt due to the bank is due from a firm, . . . and the credit belongs to an individual, or vice versa, equity does not require or justify an application of the rule of set-off. It cannot be said, in any just sense, that these are mutual debts or credits. . . . The rights of the receiver become fixed at the time of his appointment; the rights of creditors of the bank represented by him then attach. . . . Parties must stand or fall by the condition of things in existence at the time of the appointment of the receiver, unless special equities exist.'

"The question presented here seems to have been squarely passed upon in the case of *International Bank v. Jones,* 119 Ill., 407, 9 N. E., 885, where the Court said: 'The general rule is that a bank has a right of set-off, as against a deposit, only when the individual, who is both depositor and debtor, stands in both these characters alike, in precisely the same relation, and on precisely the same footing towards the bank, and hence an individual deposit cannot be set off against a partnership debt.'

"The converse rule is likewise true, that a partnership deposit cannot be set off against an individual debt. Neither, in our opinion, do the facts in this case fall within the exception, to the effect that the rule that mutuality is essential to the validity of a set-off does not apply where it is necessary to allow a set-off to do complete equity, or to prevent irremediable injustice. The firm of Reed and Boughton were depositors along with other depositors, and will suffer no greater injustice, in so far as their deposit is concerned, than others like situated."

It is true that a creditor or depositor may assign his claim against, or deposit in, an insolvent bank, but the assignee would take only the right assigned, *i. e.,* the right to share pro rata with others of his class in the distribution of the trust estate. *Brown v. Brittain,* 84 N. C., 552. And if the assignee is himself a debtor of the bank, he will not be allowed to use the assigned claim as a set-off. *Comr. of Banks v. White,* 202 N. C., 311, 162 S. E., 736; *Davis v. Mfg. Co., supra.* For, to do so would be to give the assignee a greater right than the assignor had. *Brown v. Brittain, supra;* 7 C. J., 746.

The demand of both partners that the partnership account be set off against the individual indebtedness of one of the partners is no more than an assignment of the partnership account to the individual partner; and as the individual partner or assignee here is already a debtor of the bank, he may not use the claim so assigned as a set-off. *Williams v. Williams,* 192 N. C., 405, 135 S. E., 39; *Davis v. Mfg. Co., supra.*

In a South Carolina case, *Bank v. Allen,* 146 S. C., 167, 143 S. E., 646, practically on all-fours with the one at bar, it was held (as stated in 2 and 3 head-notes):

2. "A debtor of an insolvent bank will not be permitted to set off against his debt a claim for deposit assigned to him after insolvency of bank.

3. "Assignment of interest in partnership deposit to partner indebted to bank, made after bank's insolvency, did not give to assignee the right of set-off against his individual debt for the interest so assigned to him."

No importance is attached to the license given the cashier to draw on the partnership account and pay the note in case the bank needed the money, for the privilege or license was never exercised while the cashier had authority to act. 37 C. J., 289.

The ruling of the trial court is accordant with the decisions on the subject and will be upheld.

Affirmed.

FARMVILLE OIL AND FERTILIZER COMPANY v. HENRY C. BOURNE, ADMINISTRATOR OF W. L. REASON.

(Filed 1 November, 1933.)

Executors and Administrators D e — Deficiency after foreclosure of decedent's mortgage and taxes come in first and third classes of priority.

The priority of payment of the debts of a decedent is determined by C. S., 93, and a specific lien against the lands of decedent by registered mortgage is placed in the first class, and taxes assessed at the death of the decedent are placed in the third class, and where the lands have been foreclosed and bought in by the mortgagee who pays the taxes, and there is a deficiency after the application of the purchase price to the mortgage debt, a complaint setting forth these facts in an action by the mortgagee to subject the other lands of the decedent to the payment of the deficiency and taxes states a good cause of action, and defendant administrator's demurrer thereto should be overruled, and the rule that taxes assessed at the death of decedent come within the third class for payment is not affected by the provisions of C. S., 7980, requiring that taxes assessed against the property should be paid from the proceeds of foreclosure sale.

APPEAL by defendant from a judgment of *Daniels, J.*, overruling a demurrer to the complaint. From EDGECOMBE.

The following are in substance the material allegations of the complaint. In June, 1928, W. L. Reason executed a deed of trust to Henry C. Bourne, trustee, conveying about 600 acres of land in Edgecombe County, to secure the payment of $14,187.40 to the Farmville Oil and Fertilizer Company. The deed of trust was duly registered on 14 September, 1928. In December, 1930, W. L. Reason died intestate, and Henry C. Bourne thereafter qualified as administrator of his estate. At the time of the death of W. L. Reason taxes against the land described in the deed of trust were due and unpaid for the year 1930, in a sum which at the time of subsequent payment amounted to $552.13 and subsequently the land was sold for taxes and a certificate of sale was delivered to the county. Default was made in the payment of the secured indebtedness and upon demand of the Farmville Oil and Fertilizer Company, Henry C. Bourne, trustee, foreclosed the deed of trust in November, 1931, and J. I. Morgan for the Farmville Oil and Fertilizer Company bid in the property for $10,000, the indebtedness secured in said deed of trust at that time amounting to the principal sum of $14,187.40, with some accumulated interest.

No increased bid was made and the plaintiff requested of the defendant the execution of a conveyance for the land sold under the deed of trust. The defendant refused to comply with the request unless the plaintiff paid him the purchase price ($10,000) so that the trustee could pay therefrom the cost and expense of foreclosure and the taxes of 1930 with interest, cost, and penalties due the county, or unless the plaintiff paid to the trustee the cost and expense of foreclosure and paid to the county the taxes of 1930 together with the cost and penalties and obtain and deliver to the defendant a receipt therefor and turn over to the defendant a receipt for the remainder of the purchase price.

The plaintiff then paid to the county out of its own funds $552.13 in settlement of the taxes of 1930 and interest, cost, and penalties; delivered to the defendant a receipt for these items; paid him $232.30 in settlement of the cost and expense of foreclosure; and gave him a receipt for the remainder of the purchase price. The defendant thereupon delivered to the plaintiff a deed for the land described in the deed of trust.

The plaintiff alleges that there are now two or three tracts of land, a part of the estate of the deceased, which have not been sold by the defendant and that from their sale enough money should be realized to pay the costs of the administration and the first two classes of preferred claims.

The plaintiff prays judgment that the defendant be required to file and allow said claim of $552.13 as a preferred claim under the third class of preferred claims against his intestate's estate, with interest on said claim from 4 April, 1932, at the rate of 6 per cent per annum; that it recover judgment of the defendant for said sum of $552.13 with interest on the same at the rate of 6 per cent per annum from 4 April, 1932, until paid; that defendant be required to file his petition and sell the remaining lands of his intestate for the purpose of raising money to pay said debt, with interest and costs; and that out of said funds the defendant be required to pay plaintiff the said amount of money with interest, as aforesaid, after the payment of all debts against his intestate's estate which may fall within the first two classes of preferred claims as set forth in C. S., 93 and that he be required to pay the costs of this action; and that the plaintiff have such other and further remedy as it may be entitled to in the premises.

The defendant demurred to the complaint on the ground that it does not state a cause of action in that it appears upon the face of the complaint that the defendant is not indebted to the plaintiff on any claim of priority as alleged.

The court overruled the demurrer and gave the defendant leave to file an answer. The defendant excepted and appealed.

H. H. Philips for plaintiff.
Henry C. Bourne for defendant.

ADAMS, J. The order in which the debts of a decedent must be paid is prescribed by section 93 of the Consolidated Statutes. Recognizing priority of classes, this statute provides for the administration of assets for the benefit of all the creditors according to definite and established rules. *Trust Co. v. Lentz,* 196 N. C., 398; *Bowen v. Daugherty,* 168 N. C., 242; *Atkinson v. Ricks,* 140 N. C., 418. It is founded on the theory that the question of priority among claims shall be determined upon the facts as they exist at the death of the debtor. *Tarboro v. Pender,* 153 N. C., 427.

The first class in section 93 is composed of debts which by law have a specific lien on property to an amount not exceeding the value of such property, and the third class, of taxes assessed on the estate of the deceased before his death. It is admitted that the taxes for the year 1930 had been assessed against the land described in the deed of trust previously to the death of W. L. Reason and had not been paid; they were, therefore, in the third class. So the immediate question is whether the deed of trust executed for the benefit of the plaintiff secured a debt which by law had a specific lien on property, as provided in the first class. We are of opinion that the question should be answered in the affirmative. Where after the lessee of turpentine boxes had died his personal representative sold the turpentine in the boxes and on the trees, it was held that the proceeds of the sale should be applied in payment of the lessor's lien. C. S., 2363; *Pate v. Oliver,* 104 N. C., 458. The statute created the lien; but antecedent to the lien was the contract of the parties. In like manner the deed of trust expressed the terms of the contract and upon its execution and registration conveyed the legal title to the trustee for the benefit of the plaintiff, who upon default had the legal right to subject the land to the payment of its claim. The secured notes executed by the deceased represented a debt to which pursuant to the deed of trust, the law attached a specific lien on the property. In the order of payment this debt, being in the first class, has priority over the payment of taxes provided for *eo nomine* in the third subdivision of the statute.

The appellant cites C. S., 7980, which provides that whenever any real estate shall be sold by any person under a power of sale conferred upon him by a . . . deed of trust, the person making such sale must pay out of the proceeds of sale all taxes then assessed upon such real estate and such sums as shall be necessary to redeem the land, if it has been sold for taxes and such redemption is practicable; but we are convinced that the General Assembly did not intend to abolish the method definitely prescribed for administering the estate of a person deceased or to modify the statutory direction as to the order in which the decedent's debts should be paid. Neither *Smith v. Miller,* 158 N. C., 98, nor *Callahan v. Flack, ante,* 106, is in conflict with this position.

The parties have requested that we determine the question of priority between the claims above stated, but as to any other contentions we make no adjudication beyond the holding that the complaint states a cause of action and that the trial court made no error in overruling the demurrer. Judgment

Affirmed.

J. R. RAINES AND M. B. RAINES, TRADING AS THE RAINES HARDWARE COMPANY, v. RUFUS W. GRANTHAM.

(Filed 1 November, 1933.)

1. Payment C a: Bills and Notes D c—

A check is only conditional payment and does not ordinarily discharge the debt until paid by the drawee bank, but if a check is not paid on account of the payee's unreasonable delay in presenting it for payment, the negligence of the payee will discharge the debtor.

2. Same—

In determining what is a reasonable time for the presentment of a check for payment regard must be had to the nature of the instrument, the customs and usages of trade in regard to such instrument, and the facts of the particular case. C. S., 2978, 3168.

3. Same—Check does not operate as payment where it would not have been paid if presented for payment in due course.

Where a jury trial is waived and the trial court finds that the payee was given a check in payment of goods purchased by the drawer, that the check was delivered to the payee at seven o'clock, p.m., 21 December, and that if the check had been deposited in the payee's bank in another town the next morning it would not have cleared the drawee bank before it permanently closed because of insolvency after the close of business 24 December, and that the payee had no reason to apprehend the precarious condition of the drawee bank, the trial court's judgment that the payee was not guilty of unreasonable delay in holding the check until after the insolvency of the drawee bank, in that the check would not have been paid if presented in due course, and allowing the payee to recover on the original debt for the goods, is upheld, the findings of fact in the case being conclusive on appeal.

APPEAL by defendant from *Grady, J.*, at February Term, 1933, of JOHNSTON. Affirmed.

This is an action to recover of the defendant the sum of $1,046.35, with interest from 21 December, 1931, the said sum being the balance due on the purchase price of 36 bales of cotton sold and delivered by the plaintiffs to the defendant.

In his answer, the defendant alleges that he has paid the balance due by him to the plaintiffs on the purchase price of said cotton, and that for this reason the plaintiffs are not entitled to recover in this action.

A trial by jury was waived. It was agreed by the parties that the judge should hear the evidence, find the facts, and render judgment thereon. The judge heard the evidence, and found the facts as follows:

The plaintiffs are now and were during the month of December, 1931, merchants and farmers, doing business as a partnership at Princeton, a village in Johnston County, North Carolina. The defendant is now and was during said month, a farmer, residing in Bentonville Township, in said county and State.

On 2 December, 1931, the plaintiffs sold and agreed to deliver to the defendant, from time to time, 36 bales of cotton. At the date of the said sale, the defendant paid to the plaintiffs, on the purchase price of said cotton, the sum of $50.00. This payment was made by a check drawn by the defendant on the Wayne National Bank of Goldsboro, in Wayne County, North Carolina, dated 2 December, 1931, and payable to the order of the plaintiffs. This check was presented for payment by the plaintiffs, and was duly paid by said bank on 6 December, 1931. On 18 December, 1931, the defendant paid to the plaintiffs, on the purchase price of said cotton, the sum of $100.00. This payment was made by a check drawn by the defendant on the Wayne National Bank of Goldsboro, N. C., dated 18 December, 1931, and payable to the order of the plaintiffs. This check was deposited by the plaintiffs on 18 December, 1931, with the First and Citizens Bank and Trust Company of Smithfield, N. C., and was thereafter in due course presented for payment, through the mail, and paid by the drawee bank on 21 December, 1931.

The delivery of said 36 bales of cotton was completed on 21 December, 1931. At about 7 o'clock, p.m., on said day, the defendant delivered to the plaintiffs, at Princeton, N. C., in payment of the balance due by him to the plaintiffs, on the purchase price of said cotton, his check for $1,046.35. This check was drawn by the defendant on the Wayne National Bank of Goldsboro, N. C., dated 21 December, 1931, and was payable to the order of the plaintiffs. The check was held by the plaintiffs from the date of its issuance, until 24 December, 1931, and was not presented for payment, or deposited in bank for collection by the plaintiffs. The Wayne National Bank of Goldsboro, N. C., was open for business, during the usual banking hours, on 22, 23 and 24 December, 1931. It closed at the usual hour on 24 December, 1931, and has not since opened for business. On 27 December, 1931, the said bank went into liquidation, under the supervision of the Comptroller of the Currency. It has not resumed business. The said check for $1,046.35 has not been presented for payment and has not been paid. From the date of the issuance of said check until the closing of said bank, the defendant had on deposit therein to his credit, and subject to his check, a sum in excess of the amount of said check.

There was no bank at Princeton during the month of December, 1931. The plaintiffs did their banking business during said month with the Bank of Pine Level, N. C., and with the First and Citizens Bank and Trust Company of Smithfield, N. C. Both said banks are located in Johnston County. The Wayne National Bank of Goldsboro, N. C., is in Wayne County, and is about twelve miles from Princeton. The minimum time within which a check drawn on the Wayne National Bank of Goldsboro, N. C., and deposited in the Bank of Pine Level, N. C., or in the First and Citizens Bank and Trust Company, at Smithfield, N. C., for collection, can be cleared, in the usual course of business, is three days. If the check dated 21 December, 1931, and drawn on the Wayne National Bank of Goldsboro, N. C., had been deposited by plaintiffs, for collection, on 22 December, 1931, in either the Bank of Pine Level, N. C., or in the First and Citizens Bank and Trust Company of Smithfield, N. C., it could not have been presented and paid in the usual course of business prior to 24 December, 1931, the last day on which the Wayne National Bank of Goldsboro, N. C., was open for business. The plaintiffs did not know, or have reason to apprehend, that the Wayne National Bank of Goldsboro, N. C., was in a precarious condition during the week before the said bank closed for purposes of liquidation.

On these facts the court was of opinion, and so found, that the delay of the plaintiffs in presenting the check for payment was not unreasonable, and adjudged that plaintiffs recover of the defendant the sum of $1,046.35, with interest from 21 December, 1931, and the costs of the action. The defendant appealed to the Supreme Court.

W. P. Aycock for plaintiffs.
F. H. Brooks for defendant.

CONNOR, J. Where a check has been issued by a debtor and delivered by him to his creditor, in payment of his debt, the check is ordinarily merely a conditional payment. If the check is duly presented for payment, within a reasonable time after the date of its issuance, and upon such presentment is paid by the drawee bank, the debt is paid, and the debtor is discharged; if the check is not paid upon such presentment, the debt is not paid, and the creditor may recover of his debtor on his original obligation. If, however, the check is held by the payee, and is not presented for payment within a reasonable time after the date of its issuance, and for that reason is not paid because of the subsequent insolvency of the drawee bank, the debt is nevertheless paid, and the creditor cannot recover of his debtor on his original obligation. In such case, the debtor is discharged, because of the negligence of the payee or holder of the check, resulting in his loss because of the insolvency of the drawee bank.

These principles are well settled as the law in this State, and elsewhere. *Chevrolet Co. v. Ingle,* 202 N. C., 158, 162 S. E., 219; *Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3; 48 C. J., 53. They are applicable to the facts found by the judge in the instant case. The question of law, therefore, presented by this appeal is whether there was error in the judgment which is predicated upon the finding of fact and conclusion of law that the delay of the plaintiffs in presenting the check for payment was not unreasonable.

It is provided by statute that in determining what is a reasonable or an unreasonable time within which a check must be presented for payment, where the check was issued and delivered in payment of a debt, regard must be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case. C. S., 2978, C. S., 3168. In *Mfg. Co. v. Summers,* 143 N. C., 102, 55 S. E., 522, it is said by *Hoke, J.,* that the statute prescribes as definite a rule as can well be established, or as is desirable. In *Brittain v. Johnson,* 12 N. C., 293, *Taylor, C. J.,* says: "Though it may be inconvenient to have several rules, applicable to different classes of persons, it is confessedly more so to have one applied to all, which is wholly unsuited to the habits, transactions, and experience of the greater number. It is impossible to lay down a rule in the abstract which is equally just in its bearing on all persons to be affected by it; it must depend upon the circumstances of the case, and must be determined by the jury, under the directions of the court."

In view of all the facts found by the judge in the instant case, which are conclusive and not reviewable by this Court, we are of the opinion that there was no error in the judgment. It is

Affirmed.

RICHLANDS SUPPLY COMPANY v. L. M. BANKS.

(Filed 1 November, 1933.)

Limitation of Actions B a—Statute of limitations against account current runs from date of last cash payment thereon.

The purchase of merchandise on credit, the purchaser paying a certain sum in cash on the account each fall, and the balance due on the account being carried forward into the next year and the next year's purchases being added thereto, is not a mutual, open and current account within the purview of C. S., 421, but is an account current, and as to all items purchased within three years from the last cash payment the three year statute of limitations will begin to run from the date of the last cash payment, and in an action to recover the balance due, instituted more than three years after the last item charged, but within three years from the last cash payment, an instruction that the whole account was barred by the statute of limitations is error. Whether the account became an account stated at the end of each year is not decided, the plaintiff having failed to make such contention.

APPEAL by plaintiff from *Moore, Special Judge,* at May-June Special Term, 1933, of ONSLOW.

Civil action to recover $595.75 with interest, alleged to be "due by account for goods, wares and merchandise sold and delivered to the defendant by the plaintiff firm."

The facts are these: The defendant, a farmer, began buying merchandise on credit at plaintiff's store the latter part of 1925. On 26 January, 1926, the account was paid in full for all items theretofore purchased.

During the remainder of the year 1926, the defendant bought at various times from plaintiff's store goods amounting to $446.75. In the fall of that year payments were made amounting to $363.75, leaving a balance of $83.00 which was brought forward by plaintiff as the first item on the 1927 account.

During the year 1927, defendant's purchases (including the balance of $83.00 brought over from the previous year) amounted to $681.02. Payments were made during the fall amounting to $581.02, leaving a balance of $100 which was brought forward by plaintiff as the first item on the 1928 account.

In 1928 the account was run to a total (including the balance of $100 brought over from the previous year) of $882.86, and payments were made during the year amounting to $452.50, leaving a balance of $430.36 which was brought forward by plaintiff as the first item in the 1929 account.

In 1929 new purchases by the defendant extended this balance to $567.80, the last debit entry against the defendant being made on 13 June, and the last credit entry shows a cash payment of $70.00 made by the defendant on 7 December, 1929.

This suit was instituted by the issuance of summons on 6 December, 1932, just three years, lacking one day, from the date of the last payment by defendant.

Upon plea of the three-year statute of limitations interposed by the defendant, there was a directed verdict against plaintiff's claim. From this ruling, the plaintiff appeals, assigning errors.

Nere E. Day for plaintiff.
John D. Warlick for defendant.

STACY, C. J. That the plaintiff's cause of action is not "to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties," etc., as contemplated by C. S., 421, may be conceded from a consideration of the decisions dealing with this section. *Brock v. Franck,* 194 N. C., 346, 139 S. E., 696; *McKinnie Bros. v. Wester,* 188 N. C., 514, 125 S. E., 1; *Hollingsworth v. Allen,* 176 N. C., 629, 97 S. E., 625; *Green v. Caldcleugh,* 18 N. C., 320.

But while the plaintiff's entire account may not be saved by the provisions of C. S., 421 from the bar of the three-year statute of limitations, it does not follow that the whole account is thereby barred. Under the principle announced in *Phillips v. Penland,* 196 N. C., 425, 147 S. E., 731, *Wood v. Wood,* 186 N. C., 559, 120 S. E., 194, *Alley v. Rogers,* 170 N. C., 538, 87 S. E., 326, and others of like import, it would seem that plaintiff is entitled to recover for all purchases made within three years next immediately preceding the cash payment of $70.00 on 7 December, 1929, less any payments by the defendant during said period. The effect of this payment on 7 December was to stop the running of the statute of limitations against all items not then barred, and to fix a new *terminus a quo* from which the statute would start to run anew. *Supply Co. v. Dowd,* 146 N. C., 191, 59 S. E., 685. The payment was an acknowledgment of the debt.

We do not understand that the account current, for such it is (*Kimboll v. Person,* 3 N. C., 394), became an account stated at the end of each year, though perhaps this might be inferred from the dealings between the parties. *Stokes v. Taylor,* 104 N. C., 394, 10 S. E., 566; *O'Hanlon Co. v. Jess,* 58 Mont., 415, 193 Pac., 65, 14 A. L. R., 237, and note. However, such is not the contention of the plaintiff, and we omit any consideration of this view of the matter. *Brown & M. Co. v. Gise,* 14 N. M., 282, 91 Pac., 716; Note 14, A. L. R., 240.

There was error in instructing the jury that plaintiff's entire claim is barred by the three-year statute of limitations.

New trial.

MANSON McCLEESE v. EASTERN BANK AND TRUST COMPANY.

(Filed 1 November, 1933.)

1. **Appeal and Error B d—Where defendant does not appeal from judgment for plaintiff, plaintiff's right to maintain action is not presented.**

Where defendant appeals from an order overruling its demurrer to plaintiff's complaint, and the Supreme Court dismisses the appeal because the question of whether plaintiff could maintain the action has become moot, and thereafter judgment is rendered in the trial court in plaintiff's favor, from which judgment defendant does not appeal, on plaintiff's appeal from that part of the judgment directing that security filed by defendant in the cause to secure the payment of any judgment plaintiff should recover should be returned to defendant receiver for application as a general asset, the only question presented on the appeal is the correctness of the order disposing of the security filed by defendant, and the question of plaintiff's right to maintain the action is not presented for review.

2. **Judgments O a—Where judgment for plaintiff is allowed to stand, bond filed by defendant should be applied to judgment.**

Where a judgment in plaintiff's favor is allowed to stand and is not appealed from, plaintiff is entitled to have a State bond filed by defendant to prevent receivership and to secure payment of any judgment which plaintiff should recover, applied to his judgment, and an order that the bond should be returned to defendant's receiver, later independently appointed, as a general asset, is erroneous.

APPEAL by plaintiff from *Grady, J.*, at Spring Term, 1933, of PAMLICO. Modified and affirmed.

Prior to 8 August, 1930, the Eastern Bank and Trust Company, a banking corporation organized and doing business under the laws of this State, at Bayboro, in Pamlico County, and elsewhere, had closed its doors, and was about to enter into liquidation. At said date, about 90 per cent of its depositors entered into an agreement with the said Eastern Bank and Trust Company, by which they agreed to postpone until 20 December, 1932, presentation of checks for payment, and the said Bank and Trust Company agreed to open its doors and to resume business. This agreement was approved by the North Carolina Corporation Commission and by the Chief State Bank Examiner. Pursuant to this agreement, the said Eastern Bank and Trust Company opened its doors and resumed business as a banking corporation.

On 8 August, 1930, the plaintiff had on deposit with the Eastern Bank and Trust Company, subject to his check, the sum of $853.77. He was then under the age of twenty-one years. The depositors' agreement was signed by the plaintiff, and also on his behalf by his guardian. The agreement on behalf of the plaintiff was not authorized or approved by the court, which had appointed the guardian of the plaintiff. The plaintiff became of the age of twenty-one years prior to 23 September, 1932. At said date, the plaintiff presented to the Eastern Bank and Trust Company his check for $853.77, and demanded its payment. Payment was refused because plaintiff had signed the depositors' agreement, and thereby agreed not to present his check and demand payment thereof until 20 December, 1932. The plaintiff then notified the said Bank and Trust Company that he repudiated the said agreement on the ground that he was under the age of twenty-one years when he signed the agreement, and on the further ground that his guardian was without authority to sign the agreement on his behalf. This action was begun by the plaintiff on 23 September, 1932, to recover of said Bank and Trust Company the sum of $853.77.

On 7 November, 1932, the plaintiff moved that a receiver be appointed by the court for the defendant, the Eastern Bank and Trust Company. This motion was heard and denied upon the agreement of the defendant to file a bond in the action conditioned for the payment by the defendant of such judgment as the plaintiff should recover in the action. This bond was filed by the defendant on 9 November, 1932. Thereafter with the approval of the court, the bond was withdrawn and canceled, and the defendant deposited with the clerk of the Superior Court of Pamlico County, a bond of the State of North Carolina in the sum of $1,000, in lieu of said bond. Subsequent to the deposit of said State bond, the Eastern Bank and Trust Company again closed its doors. The said Bank and Trust Company is now in process of liquidation, because of its insolvency, under the supervision of the defendant, Gurney P. Hood, Commissioner of Banks.

The action was called for trial at Spring Term, 1933, of the Superior Court of Pamlico County. On the facts found by the judge, it was ordered and adjudged that plaintiff recover of the defendants the sum of $853.77, with interest from 23 September, 1932, and the costs of the action; it was further ordered that the clerk of the court deliver to the defendant, Gurney P. Hood, Commissioner of Banks, or his liquidating agent, the North Carolina bond, now in his possession, to be held and disposed of as an asset of the Eastern Bank and Trust Company, for the payment of its general creditors. The plaintiff excepted to the judgment and appealed to the Supreme Court.

W. B. R. Guion, H. P. Whitehurst and John A. Guion for plaintiff.
Warren & Warren for defendants.

CONNOR, J. The defendants' appeal from the order overruling the demurrer to the complaint filed by the defendants in this action, was dismissed by this Court on the ground that the question of law presented by the demurrer had become moot and academic, because under the depositors' agreement which the plaintiff had signed before he became twenty-one years of age, the plaintiff had the right, in any event, to demand payment of his check on the defendant, Eastern Bank and Trust Company after 20 December, 1932. See *McCleese v. Trust Co.,* 204 N. C., 355, 168 S. E., 210. The defendants did not except to or appeal from the judgment at Spring Term, 1933. The right of the plaintiff to maintain this action, which was begun on 23 September, 1932, is not presented by this appeal.

The only question presented by plaintiff's appeal is whether there was error in the judgment directing the clerk of the court to deliver to the defendants the North Carolina bond in his possession, to be held and disposed of by the defendant, Gurney P. Hood, Commissioner of Banks, as an asset of the defendant, Eastern Bank and Trust Company, for the payment of its general creditors. On the facts found by the judge, the plaintiff has a lien on the bond for the payment of his judgment in this action. It was error to order the bond delivered to the defendants as a general asset of the Eastern Bank and Trust Company. The plaintiff is entitled to an order for the enforcement of his lien on the bond. The judgment should be modified to that end.

Modified and affirmed.

EDWARD DALTON SMITH v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 1 November, 1933.)

Removal of Causes D a—Value of property of which defendant would be deprived by judgment demanded determines amount involved.

In this action on a policy of life insurance plaintiff claimed disability entitling him to waiver of subsequent premiums and the payment of disability benefits for his lifetime during continuance of the disability, and that upon his death defendant would be liable for $5,000, the face amount of the policy, and prayed judgment for $300 accrued disability benefits and accrued interest and that defendant be required to pay plaintiff $50.00 per month during continuance of the disability. Defendant filed a petition for removal of the cause to the Federal Court. *Held*, the suit did not involve $3,000, the required jurisdictional amount, and the petition should have been denied, the test being the value of the property of which defendant would be deprived by the judgment demanded.

CIVIL ACTION, before *Grady, J.*, at April Term, 1933, of PITT.

The plaintiff instituted this action against the defendant, alleging that on 9 October, 1926, the defendant issued a life insurance policy in the sum of $5,000 upon the life of plaintiff. The beneficiary named in the policy was the mother of plaintiff, and the annual premium was $168.00. It was further alleged "that under said policy and contract of insurance there was a provision known therein as total and permanent disability, which provides that upon the insured becoming disabled by injury or disease that wholly prevents him from performing any work or engaging in any business for remuneration or profit, occurring after the said insurance policy took effect and before the anniversary of the policy . . . , and upon receipt at the home office, before any default of payment in premium, of the proof of insured's total disability and that he would be continuously so totally disabled for life or that he has stated that he is and for a period of three consecutive months has been totally disabled as above defined he shall be entitled to the benefits of a waiver of premium and $10.00 per month for each $1,000 set forth on the face of and in said policy for each completed month from the commencement of and during the entire period of the continuous total disability of the plaintiff." The plaintiff further alleged that he had suffered a total and permanent disability and furnished proof thereof, and that in accordance with the terms of the policy "he was entitled to have the said provision of said policy put in full force and effect for the month of September, 1932, entitling plaintiff to $50.00 per month from the said 1 September, 1932, continuously each month thereafter, and at the time of instituting this action the plaintiff is entitled to $300.00 and such interest as accrued thereunder and entitled to have a waiver of the premium due in October, 1932, and continuously thereon during and for the remainder of plaintiff's permanent disability or life, and upon his death a complete payment of said policy to said beneficiary named therein or as provided by law."

Upon such allegations the plaintiff prayed that he recover the amount of installments due at the time of instituting the action, and that the defendant be required to pay the sum of $50.00 per month during and continuing his permanent disability. The defendant in apt time duly filed a petition for removal upon the ground of diverse citizenship, and that more than $3,000 was involved in the litigation, exclusive of interest and cost. The clerk of the Superior Court ordered the cause removed to the Federal Court and such order was approved by the trial judge, and the plaintiff appealed.

S. J. Everett for plaintiff.
Albion Dunn for defendant.

BROGDEN, J. The question for decision is whether the cause was removable upon the allegations contained in the complaint, upon the ground that the suit involved more than $3,000, thus ousting the jurisdiction of the State court.

There are three decisions of this Court bearing upon the subject involved, to wit: *Harrison v. Allen,* 152 N. C., 720, 68 S. E., 207; *Fields v. Ins. Co.,* 199 N. C., 454, 154 S. E., 738; *Smith v. Travelers Protective Association,* 200 N. C., 740, 158 S. E., 402. The *Fields case, supra,* is directly in point and decisive of the controversy. The Court said: "In cases involving removal to the Federal Court on the ground that more than $3,000 is involved, the test is the value of the property of which the defendant may be deprived by the judgment demanded, rather than the amount of the claim of plaintiff alone, where, of course, such claim upon its face does not exceed the jurisdictional limitations." The North Carolina cases are supported in principle by *Wright v. Ins. Co.,* 19 Fed. (2d), p. 117; *New York Life Ins. Co. v. Swift,* 38 Fed. (2d), 175; *Woods v. Mass. Protective Association,* 34 Fed. (2d), 501; *Beaty v. Mass. Protective Association,* 158 S. E., 206.

The defendant relies upon the *Swift case, supra.* It is to be noted, however, that in the *Swift case* the suit was brought to cancel two policies of $5,000 each, and hence is distinguishable from the case at bar.

Reversed.

ALTON WILLIAMSON, BY HIS NEXT FRIEND, HESSIE HUDSON, v. OLD DOMINION BOX COMPANY.

(Filed 1 November, 1933.)

1. **Master and Servant A b: C a—Employment of boy between 14 and 16 years old on duly issued certificate of welfare officer is not unlawful.**

Where an employer, before employing a boy between 14 and 16 years of age, procures and in good faith relies upon a certificate duly issued by the county welfare officer authorizing such employment, C. S., 5034, the employment of the minor is not unlawful, and the decision in *McGowan v. Mfg. Co.*, 167 N. C., 192, is not applicable to an action brought by the minor to recover for an injury sustained in the course of his employment.

2. **Master and Servant C a—Violation of C. S., 5033 must be proximate cause of injury in order to entitle employee to recover.**

In order to make an employer liable in damages for an injury sustained by an employee between 14 and 16 years of age in being required to work more than 8 hours a day in violation of C. S., 5033, it must be shown that the violation of the statute was a proximate cause of the injury complained of.

3. **Master and Servant C b—Evidence held insufficient to establish negligence on part of employer.**

Where the evidence tends only to show that an employee between 14 and 16 years of age, engaged in an unhazardous duty, was injured by tripping over a lever to a machine placed outside of the provided passageway, without evidence that the machinery was negligently placed in the factory, and that he returned to work several days after the injury and was again similarly injured while attempting to use an elevator solely in a spirit of mischief, without evidence of any defect in the elevator *is held* insufficient to be submitted to the jury in an action against the employer to recover for the injuries.

APPEAL by defendant from *Oglesby, J.,* at July Term, 1933, of RANDOLPH. Reversed.

This is an action to recover damages for personal injuries suffered by plaintiff, while at work as an employee of the defendant.

The plaintiff was born on 24 June, 1914. He was employed by defendant during the month of November, 1928, to work in its factory located in the town of Asheboro, N. C. Prior to his employment, he had completed the course of study prescribed by law for the fourth grade in the public schools of this State. He had procured from the welfare officer of the county a card authorizing his employment by the defendant. This card, showing his age, and the permission of the welfare officer for his employment was filed by the plaintiff with the defendant. The plaintiff, during his employment by the defendant, was required to work and did work ten hours per day.

The defendant is a corporation and is engaged in the business of manufacturing small paper boxes. It has no complicated or dangerous machinery in its factory. The duty of the plaintiff as an employee of the defendant, was to stack the paper boxes manufactured by the defendant against the walls on the first floor of the factory, and from time to time to take paper boxes from the first to the second floor. He was not required to work and did not work at or near machinery. There was no danger in the work which the plaintiff was required to do. The process of stacking the paper boxes was simple, and required but little strength or skill. There was a stairway between the first and second floors of the factory, for the use of the employees. There was also an elevator between the two floors, which was used to carry trucks loaded with paper boxes from one floor to the other. This elevator was operated by the use of ropes. The operation was simple and required but little strength or skill.

On 2 February, 1929, while the plaintiff was at work on the second floor of the factory, he left the place at which he was required to work, and started to the elevator. He was running or walking fast to get to the elevator, before it was lowered by another employee. He passed a baling machine, which was located off the passage way to the elevator and tripped over an iron bar which was attached to the machine. This iron bar extended about three or four feet from the machine, but did not extend into the passage way to the elevator. The plaintiff did not see, but could have seen the iron bar, if he had looked carefully. Plaintiff fell to the floor and broke his arm. He was sent by the defendant immediately to a doctor, who set his arm and treated his injuries. He returned to his work the next day.

The plaintiff continued in the employment of the defendant until 10 April, 1929. On said day, while undertaking to operate the elevator by pulling one of the cords, plaintiff again broke his arm. The plaintiff was not required to operate the elevator, but in a spirit of mischief ran ahead of another employee of the defendant, and jumped upon the elevator, in an effort to move the elevator before the other employee could get to it.

In his complaint, the plaintiff alleged that his injuries, both on 2 February and on 10 April, 1929, were caused by the negligence of the defendant as specifically alleged therein. These allegations were denied in the answer filed by the defendant.

The issues raised by the pleadings were submitted to the jury, and answered in accordance with the contentions of the plaintiff.

From judgment that plaintiff recover of the defendant the sum of $500.00, his damages as assessed by the jury, and the costs of the action, the defendant appealed to the Supreme Court.

I. C. Moser and J. C. Sedberry for plaintiff.
A. I. Ferree and Fred W. Bynum for defendant.

CONNOR, J. The plaintiff was over fourteen and under sixteen years of age at the time he was employed by the defendant to work in its factory, and also at the times he was injured while working as such employee. Before employing the plaintiff, the defendant, in good faith, procured, relied upon and placed in its files a certificate issued by the welfare officer of Randolph County, in accordance with the rules and regulations prescribed by the State Child Welfare Commission, authorizing the employment, C. S., 5034. The employment was, therefore, not wrongful or unlawful. For this reason the decision of this Court in *McGowan v. Mfg. Co.,* 167 N. C., 192, 82 N. C., 102, is not applicable to the instant case. The fact that the plaintiff was required to work and did work, during his employment, ten hours per day, in violation of the statute, C. S., 5033, has no causal connection with his injuries. It is only when the employment of a child is unlawful because in violation of the statute, that such violation is in itself evidence of actionable negligence; when the employment was not in violation of the statute, but the employee is required to work and does work more than eight hours per day, and is injured while at work, there must be evidence tending to show that the violation of the statute was a proximate cause of the injury; otherwise the plaintiff is not entitled to recover damages for injuries suffered by him while engaged in the performance of his duties.

There was no evidence tending to show that defendant was negligent in the location within its factory of the baling machine, or that there was any defect in the elevator. After carefully considering all the evidence appearing in the record, we cannot escape the conviction that plaintiff's injuries were caused by his own negligence, and not by any negligence on the part of the defendant. *Tart v. R. R.*, 202 N. C., 52, 161 S. E., 720.

There was error in the refusal of defendant's motion for judgment dismissing the action as of nonsuit. For that reason, the judgment is

Reversed.

CAROLINE W. HUDSON v. TOWN OF MORGANTON.

(Filed 1 November, 1933.)

Municipal Corporations E g—Abandoning use of land through apprehension of violating watershed regulations will not support action against city.

Plaintiff brought action alleging that through apprehension of violating sanitary regulations promulgated by defendant city for lands within its watershed she abandoned the use to which she had previously put her land, her apprehension being based on ignorance of the regulations through defendant city's failure to serve notice of such regulations on her as required by statute and her apprehension of incurring the penalties therein provided: *Held*, defendant's demurrer to the complaint was properly sustained, the city having acquired no easement in the lands by grant, prescription, dedication or condemnation, and the plaintiff not being liable for the statutory penalty unless notice of the regulations had been served on her, and the complaint failing to allege any actual trespass by defendant, or any action on its part to enforce the regulations, or that defendant had wrongfully diverted or diminished the flow of water on plaintiff's land, or any specific allegation that plaintiff's land was within defendant's watershed.

APPEAL by plaintiff from *Finley, J.*, at June Term, 1933, of BURKE. Affirmed.

The plaintiff alleges that the defendant deprived the plaintiff of the beneficial use and occupation of her land by establishing a watershed and using water from a creek which ran through the premises; by forbidding trespassing on the watershed or interfering with the water system; and by failing to comply with C. S., 7116, *et seq.*

The defendant filed an answer denying the material allegations of the complaint and pleading the provisions of Private Laws, 1927, chap. 26, and demurred to the complaint on the ground that it does not state a cause of action.

The trial court dismissed the action and gave judgment as follows:

"It appearing to the court that plaintiff's cause of action is alleged injury or damage to her premises by reason of the defendant taking water from a stream flowing through defendant's premises in the effort of the defendant, in the exercise of governmental function or duty, to protect its watershed, and it further appearing to the court that the plaintiff's alleged cause of action as aforesaid fails to allege in the complaint herein filed that the defendant, town of Morganton, actually entered on any portion of plaintiff's said lands or committed any actual trespass thereon, and that such alleged cause of action fails to allege any actual trespass by the defendant on plaintiff's said premises; it further appearing to the court that it is nowhere alleged in plaintiff's complaint that the defendant, town of Morganton, took any action whatever in any regular or call meeting with respect to plaintiff's said lands or premises; it further appearing to the court that plaintiff fails to allege that any claim for damages was filed by the plaintiff with the defendant, town of Morganton, within 90 days from the accrual of said cause of action. The court is of the opinion that plaintiff has failed to state a cause of action in her complaint against the said defendant, town of Morganton, and sustains the defendant's motion."

The plaintiff excepted and appealed.

I. T. Avery for appellant.
Mull & Patton for appellee.

ADAMS, J. The judgment of the Superior Court is affirmed. The defendant has not acquired an easement in the land of the plaintiff by grant, prescription, dedication, or condemnation. *Davis v. Robinson,* 189 N. C., 589; *Draper v. Conner Co.,* 187 N. C., 18. Nor does the plaintiff allege that the defendant made an unlawful entry upon her land by a technical trespass. The waters of Jerry's Creek have not been wrongfully diverted or diminished to the injury of the plaintiff and the pipe extending from the creek to the main pipeline is not alleged to be on the plaintiff's premises. The defendant has not physically invaded or taken the plaintiff's property, but she insists that her right to compensation is not necessarily dependent upon the physical appropriation of her land. It is true that a municipal corporation may be liable for damages carried through the medium of polluted water or noxious air, or similar nuisance, and to this extent the damages would be deemed a taking or appropriation. *Rhodes v. Durham,* 165 N. C., 681; *Dayton v. Asheville,* 185 N. C., 12; *Sandlin v. Wilmington, ibid.,* 257. But the plaintiff's alleged cause of action is not within the principle upon which these cases were decided.

The sanitary inspector is directed personally to give to the head of each household on the watershed, or in his absence to some member of the household, instructions necessary to the proper sanitary care of his premises. These instructions must be followed, any person refusing or neglecting to comply with them being guilty of a misdemeanor. C. S., 7121, 7123. The plaintiff alleges that the defendant failed to observe these statutes and that because of her apprehension of incurring the penalty prescribed by section 7123 and of being prosecuted for alleged trespass upon the watershed she was forced to abandon the legitimate use of her premises as a home and farm. Her apprehension in these respects does not constitute a cause of action. If, as she alleges, the defendant failed to furnish the instructions for sanitation she would not have been subject to a penalty, the enforcement of which was dependent on a precedent condition which the defendant had not performed; and with reference to the notice to trespassers it may be said that the complaint has no distinct allegation that the notice was posted on the plaintiff's premises or that the watershed included her land, any implication in reference to the latter proposition arising from the alleged conversation between the plaintiff and the mayor of the town being remote and inadequate. And it is not easy to perceive in what way the abandonment by the authorities of a public road on the land in question would result in liability on the part of the defendant.

Neither of the appellant's exceptions, all of which have been considered, affords good cause for a new trial.

Affirmed.

MINNIE BELL SELLERS v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 1 November, 1933.)

1. **Insurance J b—Failure to pay note for extended premium at maturity forfeits policy according to its terms.**

   The provision in a note, given for extension of payment of premium in whole or in part on a policy of life insurance, that the policy would be forfeited without notice if the note should not be paid at maturity, determines the rights of the parties, and the policy is forfeited if the note is not paid at maturity in the absence of waiver or an agreement to the contrary.

2. **Same—Mailing of notice of next quarterly premium is not waiver of forfeiture for failure to pay extension note at maturity.**

   Where a policy of life insurance is forfeited for failure to pay at maturity a note given for extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with C. S., 6465, which notice does not demand payment of the balance due on the extended premium, is not a waiver by the insurer of forfeiture.

APPEAL by plaintiff from *Finley, J.*, at May Term, 1933, of CALDWELL.

Civil action to recover on a policy of insurance.

On 12 August, 1931, the defendant issued a policy of insurance on the life of plaintiff's husband in the sum of $1,000. Quarterly premiums in the amount of $5.97 each were payable in advance. The premiums due 12 August, 12 November, 1931, and 12 February, 1932, were paid. When the next quarterly premium fell due, 12 May, 1932, the assured made a partial payment of $1.92 and received an extension of time until 12 July, 1932, within which to pay the balance of said quarterly premium. The extension agreement provided that failure to pay the balance on said extended date would render the policy void, without notice. This balance was never paid.

In the latter part of July, 1932, the assured received from the defendant notice that quarterly premium of $5.97 would be due 12 August, 1932. Said notice shows on its face that it was sent in compliance with the provisions of C. S., 6465.

The assured died 4 August, 1932.

From a judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning error.

Louis A. Whitener and Newland & Townsend for plaintiff.
Self, Bagby, Aiken & Patrick for defendant.

STACY, C. J. It is conceded that the policy in suit lapsed on 12 July, 1932, for nonpayment of balance of the 12 May quarterly premium, unless strict compliance was waived by mailing notice of the next regular quarterly premium due 12 August, 1932, in accordance with the provisions of C. S., 6465.

As tending to support her claim of waiver, the plaintiff relies upon *Murphy v. Ins. Co.*, 167 N. C., 334, 83 S. E., 461, and *Moore v. Assurance Corp.*, 173 N. C., 532, 92 S. E., 362, but these authorities are not accordant with plaintiff's position. Had the notice been a demand for the payment of the extended balance due on the 12 May premium, similar to the demand in the *Murphy case*, quite a different situation would have been presented.

The doctrine of waiver, of course, is well established (*Ins. Co. v. Eggleston*, 96 U. S., 572), but it is also uniformly held that a note given in extension of payment, in whole or in part, of a premium due on a life insurance policy, which provides for forfeiture of the policy in case the note is not paid at maturity, or that the contract of insurance shall cease and determine upon default in payment of the note according to its tenor, such provision thereupon becomes, for the time being at least, the measuring stick for determining the rights of the parties, and avoids the policy, or contract of insurance, if said note is not paid at maturity. *Hayworth v. Ins. Co.,* 190 N. C., 757, 130 S. E., 612; *Underwood v. Ins. Co.,* 177 N. C., 327, 98 S. E., 832; *Ins. Co. v. Lewis,* 187 U. S., 335; *Deihl v. Ins. Co.,* 213 N. W. (Ia.), 753, 53 A. L. R., 1528.

Mailing notice of the regular quarterly premium due 12 August, 1932, in compliance with the provisions of the statute, was but a routine matter, and did not have the effect of waiving the intervening forfeiture and reviving the policy. *Sexton v. Ins. Co.,* 160 N. C., 597, 76 S. E., 535; *Perry v. Ins. Co.,* 150 N. C., 143, 63 S. E., 679; *McGraw v. Ins. Co.,* 78 N. C., 149. The demurrer to the evidence was properly sustained.

Affirmed.

E. C. GUY v. THE FIRST CAROLINAS JOINT STOCK LAND BANK OF COLUMBIA AND GURNEY P. HOOD, COMMISSIONER.

(Filed 1 November, 1933.)

Deeds and Conveyances C f—The law does not imply covenant of seizin in deed to lands in fee simple.

There are no implied covenants with respect to title, quantity or encumbrance in the sale of real estate, and where a deed to property in fee simple does not contain a covenant of seizin the grantee may not maintain an action against his grantor for breach of covenant of seizin in that certain mineral rights in the land had been reserved by the grantor's predecessor in title and were not conveyed by the grantor's deed, though plaintiff might maintain an action under the principles announced in *Henofer v. Realty Co.,* 178 N. C., 584.

APPEAL by plaintiff from *Hill, Special Judge,* at July Term, 1933, of AVERY.

Civil action to recover damages for alleged breach of covenant of seizin.

On 28 August, 1928, the plaintiff acquired by deed from the First Carolinas Joint Stock Land Bank of Columbia a tract of land in Avery County, North Carolina, of approximately 546 acres, valuable chiefly for grazing and mining purposes, said deed containing the following covenants:

"And the said the First Carolinas Joint Stock Land Bank of Columbia does hereby bind itself and its successors to warrant and forever defend all and singular the said premises unto the said E. C. Guy, his heirs and assigns, against itself and its successors and all persons whomsoever lawfully claiming or to claim the same or any part thereof."

It is alleged that the grantor in said deed at the time of its execution, did not own the mineral interests in said lands, the same having been expressly reserved by predecessors in title, and, to this extent, there is a failure in plaintiff's title, his deed purporting to convey the lands in fee.

From a judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

Charles Hughes and Burke & Burke for plaintiff.
Willis Smith and John H. Anderson, Jr., for defendants.

STACY, C. J. The plaintiff first sued for breach of the covenant of quiet enjoyment, but as he was not able, or failed, to allege eviction under paramount title, ouster or adverse claim, his complaint was held demurrable. *Guy v. Bank,* 202 N. C., 803, 164 S. E., 323.

The present action is for alleged breach of covenant of seizin, but as the deed under which plaintiff acquired title contains no covenant of seizin (*Cover v. McAden,* 183 N. C., 641, 112 S. E., 817, *Price v. Deal,* 90 N. C., 290), the judgment of nonsuit was properly entered. It is the rule with us that there are no implied covenants with respect to title, quantity or encumbrance, in the sale of real estate. *Peacock v. Barnes,* 139 N. C., 196, 51 S. E., 926; *Barden v. Stickney,* 130 N. C., 62, 40 S. E., 842; *Zimmerman v. Lynch, ibid.,* 61, 40 S. E., 841. In the absence of any fraud, mistake or overreaching, the doctrine of *caveat emptor* applies. *Smathers v. Gilmer,* 126 N. C., 757, 36 S. E., 153; *Walsh v. Hall,* 66 N. C., 233.

Speaking to the subject in *Foy v. Haughton,* 85 N. C., 169, *Ruffin, J.* (the younger), delivering the opinion of the Court, said: "But the rule of law is, that in sales of land it is the duty of a purchaser to guard against all defects, as well of title as of encumbrance or quantity, by taking proper covenants looking to that end, and if he fail to do so, it is his folly, against which the law, that encourages no negligence, will give him no relief."

This, however, would not deprive the plaintiff of the right to bring his action under the principles announced in *Henofer v. Realty Co.,* 178 N. C., 584, 101 S. E., 265, *Turner v. Vann,* 171 N. C., 127, 87 S. E., 985, *May v. Loomis,* 140 N. C., 350, 52 S. E., 728, if so justified by the facts.

Affirmed.

FIRST NATIONAL PICTURES DISTRIBUTING CORPORATION v. H. P. SEAWELL.

(Filed 1 November, 1933.)

1. Appeal and Error J c—

Where a jury trial is waived the findings of fact by the trial judge, supported by evidence, are conclusive on appeal.

2. Contracts F c—

While the injured party is under duty to use ordinary care to minimize the loss occasioned by the injuring party's breach of contract, the burden is on the injuring party to prove failure of the injured party to exercise such care.

CIVIL ACTION, before *Daniels, J.*, at May Term, 1933, of BERTIE.

The plaintiff instituted this action in the General County Court of Bertie County, alleging the breach of a rental contract of certain films or photoplays. The defendant denied the breach and alleged that the contract had been breached by the plaintiff.

A jury trial was waived by the parties and the cause was heard by Judge F. D. Winston, who found the facts and rendered judgment that the plaintiff recover of the defendant the sum of $805.00. There was evidence to support the findings and judgment. The defendant filed certain exceptions to the judgment and the cause was heard in the Superior Court by his Honor, F. A. Daniels. The record shows the following: "Upon hearing the appeal, the court overruled all exceptions taken by the defendant upon the trial in the General County Court, except the exception of defendant to the measure of damages, the court stating that in its opinion there was error in awarding the amount of damages recovered in that it was the duty of plaintiff to offer evidence in mitigation of damages under the facts arising in this case." Thereupon the trial judge awarded a new trial and the plaintiff appealed.

J. A. Pritchett for plaintiff.
J. H. Matthews for defendant.

BROGDEN, J. In suits based upon breach of contract, upon which party does the law impose the burden of offering evidence tending to show mitigation of damages?

A jury trial having been waived in the county court, the judge thereof found the facts and pronounced judgment thereon. There is evidence to support such findings, and consequently they are conclusive upon appeal to the Supreme Court. *Caldwell County v. George,* 176 N. C., 602, 97 S. E., 507; *Mfg. Co. v. Lumber Co.,* 178 N. C., 571, 101 S. E., 214.

The law commands that a person injured by the wrongful and negligent act of another is required to use ordinary care and prudence to protect himself from loss, or, as sometimes stated in the decisions, to minimize the loss. *Smith v. Lumber Co.,* 142 N. C., 26, 54 S. E., 788; *Advertising Co. v. Warehouse Co.,* 186 N. C., 197, 119 S. E., 196; *Mills v. McRae,* 187 N. C., 707, 122 S. E., 762; *Gibbs v. Tel. Co.,* 196 N. C., 516, 146 S. E., 209. It has also been held that the burden is upon the party committing the injury to offer evidence in mitigation of damages. A succinct statement of the principle is to be found in *Gibbs v. Tel. Co.,* 196 N. C., 516, as follows: "In an action for *tort* committed or breach of contract without excuse, it is a well settled rule of law that the party who is wronged is required to use due care to minimize the loss. . . . The burden is on defendant of showing mitigation of damages." See *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12. Therefore, while the duty is imposed upon the injured party to use ordinary care and prudence to minimize his damages, nevertheless the burden is upon the injuring party to offer evidence tending to show such breach of duty or failure to exercise the requisite degree of care and prudence to reduce and minimize the loss complained of.

Reversed.

C. M. WARREN v. W. B. McLAWHORN ET AL.

(Filed 1 November, 1933.)

Justices of the Peace C a: Election of Remedies A d—Creditor may elect to sue on original debt and return security given therefor.

A father executed a note to a merchant as security for advances agreed to be made by the merchant to the maker's three sons for their respective farms. The merchant brought three separate suits in a justice's court against each son and the father and tendered the note executed by the father. On defendants' appeal to the Superior Court, the actions were tried *de novo.* In both courts defendants demurred to the jurisdiction, claiming that one suit should have been instituted on the note which was in an amount in excess of the justice's jurisdiction, and that the Superior Court's jurisdiction was derivative. *Held,* the demurrers were properly overruled, plaintiff having the right at his election to return the note given as security and sue on each individual account.

APPEAL by defendants from *Frizzelle, J.,* at February Term, 1933, of PITT.

Civil actions, three in number, to recover for merchandise sold and delivered, consolidated in the Superior Court by consent and tried together.

The plaintiff, a merchant, agreed with W. B. McLawhorn in January, 1931, to furnish his three sons, Allen, Jimmie and E. B. McLawhorn, with supplies to run their respective farms during the year. As security for said advances the plaintiff took from W. B. McLawhorn his promissory note in the principal sum of $600.

The supplies furnished Allen McLawhorn, and for which suit is brought against him and his father, amount to $118.95; those furnished Jimmie McLawhorn, and for which suit is brought against him and his father, amount to $151.88; those furnished E. B. McLawhorn, and for which suit is brought against him and his father, amount to $198.88. Three separate suits were instituted before a justice of the peace and tried *de novo* on appeal to the Superior Court.

The defendants demurred, both in the justice's court and in the Superior Court, on the ground that a single suit should have been brought in the Superior Court on the collateral note of $600, and that the justice of the peace was without original jurisdiction to entertain the suits; likewise, the Superior Court, exercising only derivative jurisdiction, was without authority to hear the cases. The note signed by W. B. McLawhorn, but not by his sons, was tendered the maker upon the trial of the causes.

From a verdict against the several defendants in the respective sums claimed by plaintiff, the defendants appeal, assigning errors.

Albion Dunn for plaintiff.
Harding & Lee for defendant, W. B. McLawhorn.

STACY, C. J. The demurrers were properly overruled on authority of *Buggy Co. v. Dukes,* 140 N. C., 393, 52 S. E., 931, and *Supply Co. v. Davis,* 202 N. C., 56, 161 S. E., 734.

Plaintiff had his election to sue on the note, taken as security for the open accounts, or to return the collateral, when not paid at maturity, and sue on the original causes of action. Indeed, the exact liability of W. B. McLawhorn to plaintiff was not known at the time of the execution of the note, and plaintiff would not be able to recover from him more than the value of the merchandise sold and delivered, whether suit were brought on the note or resort had to actions on the open accounts.

The fear expressed by the defendant as to what his liability might have been had his note been negotiated to an innocent holder for value and before maturity is not before us for adjudication. The verdict and judgment will be upheld.

No error.

J. H. NANNIE, MRS. C. N. ALLEN, W. R. NANNIE, AND MRS. ELIZABETH FAISON, v. J. O. POLLARD, ADMINISTRATOR OF THE ESTATE OF T. J. NANNIE, AND J. O. POLLARD, GUARDIAN FOR BESSIE NANNIE, WIDOW OF T. J. NANNIE.

(Filed 1 November, 1933.)

Banks and Banking C c: Gifts A a—Deposit by husband in name of husband and wife is property of husband with agency to wife to draw thereon.

A bank deposit made by a husband and entered on the records of the bank in the name of the husband or wife does not constitute a gift *inter vivos* to the wife, there being no delivery to the wife or loss of dominion over the property by the husband, and the title to the deposit remains in the husband, the wife having only the right to draw thereon as his agent, and upon his death her power of agency is revoked, and his administrator is entitled to the deposit to be distributed as an asset of the estate.

APPEAL by defendant, J. O. Pollard, guardian of Bessie M. Nannie, from *Grady, J.,* at Second May Term, 1933, of PITT. Affirmed.

Julius Brown for appellant.
J. B. James for appellee.

ADAMS, J. In 1931 T. J. Nannie died intestate and J. O. Pollard duly qualified as administrator of his estate. The plaintiffs are surviving brothers and sisters of the deceased and Bessie Nannie, a minor, is his widow and is represented by J. O. Pollard, her guardian.

The controversy relates to a bank deposit, the appellant contending that he is entitled to the whole amount thereof in his representative capacity as guardian of the widow. The judgment sets out as an admitted fact the statement that T. J. Nannie deposited $4,343 in the savings department of the Bank of Farmville to the account of "T. J. Nannie or Bessie M. Nannie." This continued to be the form of the deposit up to and after the intestate's death. In the absence of rebutting evidence the person making a deposit in a bank is deemed to be the owner of the fund. The appeal therefore, brings up this case: A husband deposited money in a bank which was entered upon the records of the bank in the name of the husband or his wife; the husband died; the wife survived. Is the widow entitled to the deposit?

The deposit did not constitute a gift to the wife *inter vivos.* To make a gift of a bank deposit there must be not only an intention to give but a delivery and loss of dominion over the property given. 30 C. J., 701, sec. 297. The title to the deposit remained in the husband; hence the only right the wife had to draw out the money was by virtue of the authority conferred upon her by her husband, she acting as his agent; and her power as agent was revoked by the death of her husband. 3 R. C. L., 579; *Jones v. Fullbright,* 197 N. C., 274.

The trial court adjudged that the administrator of the deceased is entitled to the deposit to be distributed as assets of the estate. We concur in the judgment.

Affirmed.

GEORGE L. GRANTHAM v. LUTHER D. GRANTHAM ET AL.

(Filed 1 November, 1933.)

1. **Frauds, Statute of E c—**

   Performance on the part of the promisee does not take an oral contract out of the provisions of the statute of frauds.

2. **Specific Performance B b—**

   A parol contract for the conveyance of land cannot be enforced to the extent of decreeing specific performance of the agreement, and plaintiff may not successfully maintain that he is the *cestui que trust* and defendant the trustee of the land for his benefit.

3. **Wills B a: Frauds, Statute of, E c—Parol contract to devise real estate comes within statute of frauds.**

   A contract to devise real property comes within the provisions of the statute of frauds, and performance of services by the promisee as consideration for the contract does not take the contract out of the provisions of the statute, and the promisee cannot successfully maintain an action for specific performance of the contract. C. S., 988.

4. **Frauds, Statute of, F b—Defense of statute of frauds held not waived by failure to object to evidence relating to parol contract.**

   In a suit for specific performance of a parol contract defendant does not waive his defense of the statute of frauds by failing to object to the admission of evidence relating to the alleged contract where defendant has denied the execution of the alleged contract, such denial extending to the right to specific performance, and defendant being entitled to admit the contract in evidence and plead the bar of the statute, the defendant not denying that plaintiff was entitled to some relief on the contract.

5. **Wills B a—Promisee performing services may recover upon quantum meruit in action on unenforceable contract to devise.**

   Where a party renders personal services to another in reliance on a parol contract to devise, which the promisor fails to perform, the promisee may maintain an action against the administrators of the promisor to recover the value of such services, and where plaintiff sufficiently alleges facts entitling him to such recovery in an action against the administrators, his right to recovery will not be defeated by an untenable prayer for specific performance.

6. **Pleadings A a—**

Where a complaint sufficiently alleges facts entitling plaintiff to recovery, such recovery will not be defeated by a prayer for relief to which plaintiff is not entitled.

7. **Wills B c—Measure of damages recoverable by promisee performing services in action on parol contract to devise.**

The rule for the assessment of damages in a suit on an unenforceable parol contract to devise real property, where plaintiff has performed personal services to defendant's intestate in reliance on the promise to devise such real estate, is the value of the services rendered, the recovery being based on the theory of implied *assumpsit* or *quantum meruit*, and plaintiff is not entitled to recover the value of the land at the time the contract to devise was made. The admissibility of evidence of the value of the land at such time as tending to establish the value placed on the services by the parties and as being competent evidence of their value, discussed by *Mr. Justice Adams.*

APPEAL by defendant from *Moore, Special Judge,* at March Term, 1933, of WAYNE. New trial.

This is a suit to enforce the specific performance of a contract alleged to have been made between the plaintiff and Mrs. Edith W. Grantham.

Mrs. Grantham died intestate on 1 December, 1930; Luther D. Grantham and George L. Grantham are the administrators of her estate; William U. Grantham is her surviving husband; George L. Grantham, the plaintiff, is her son; the other defendants are her heirs at law.

In his complaint the plaintiff alleges that in May, 1919, Edith W. Grantham made a contract with him by the terms of which she promised to devise and bequeath to him all the property, real and personal, which she might own at the time of her death, in consideration of the plaintiff's agreement to remain with her during the remainder of her life, to look after property and affairs, and to contribute such amount as should be necessary for her support and maintenance; that she then expected to receive certain property from her two brothers which was to be included in her will; that she did receive certain property from them; that her contract with the plaintiff was ratified and reiterated; that on 24 May, 1923, she entered into another specific contract with the plaintiff to devise and bequeath to him all the property which she received from her brothers, in consideration of the plaintiff's agreement.

The plaintiff further alleges that he complied with the terms of the contract and expended large sums of money, not only in support of his mother, but in payment of losses sustained in the operation of her farms and the debts arising therefrom, and that his mother, possibly through inadvertence failed to comply with the terms of the contract and failed to devise and bequeath him her property, including the property derived from the estate of her brothers.

The relief demanded is a decree for specific performance and other relief, and to this end that the defendants be declared trustees for the plaintiff of property owned by Edith W. Grantham at the time of her death and that they be directed to make conveyance thereof to the plaintiff.

The defendants deny all allegations in reference to the execution of the alleged contract, including those relating to its renewal or ratification; deny that the plaintiff looked after his mother's property and affairs or contributed anything for her support and maintenance; and aver that his mother took care of and supported him.

At the trial the jury returned the following verdict:

1. Did Edith W. Grantham make the agreement with George L. Grantham in 1919, as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff, George L. Grantham, carry out his part of said agreement? Answer: Yes.

3. Did Edith W. Grantham make the agreement with George L. Grantham in 1923, as alleged in the complaint? Answer: Yes.

4. If so, did the plaintiff, George L. Grantham, carry out his part of said agreement? Answer: Yes.

The court adjudged that the plaintiff is the equitable owner of the several tracts of land described in the complaint after the life estate of William U. Grantham, that the defendants hold the remainder in trust for the plaintiff, and that the judgment operate as a conveyance to the plaintiff of the right, title, and interest of the defendants therein subject to the life estate of William U. Grantham and that the judgment be recorded in the office of the register of deeds.

The defendants excepted and appealed upon assigned error.

J. Faison Thomson, Hugh Brown Campbell and D. H. Bland for appellants.

Kenneth C. Royall and N. W. Outlaw for appellees.

ADAMS, J. The plaintiff instituted this action against the heirs of Edith W. Grantham specifically to enforce her alleged agreement to leave him at her death all her property in consideration of his services in supporting her and supervising her business affairs, subject to the life estate of her husband as tenant by the curtesy. As the contract was not reduced to writing and all the property in controversy is real estate the question first arising is whether specific performance will be decreed.

The fourth section of the Statute of Frauds (29 Char., 11, chap. 3), provides that no action shall be brought to charge any person "upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action is brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." In *Smith v. Williams*, 5 N. C., 426, 431, it was held that this statute (enacted in 1676 or 1677) being posterior to the date of the charter under which the State was settled, did not become effective here until 1715, when the common law was declared to be in force (C. S., 970)—the statute with additional clauses subsequently enacted (1819) appearing in chapter 50 of the Revised Statutes. C. S., 988.

It is not questioned that a written contract to devise real property may be valid when supported by a sufficient consideration or that it may be enforced in a court of equity. *Price v. Price,* 133 N. C., 503; *Stockard v. Warren,* 175 N. C., 283. But we are not aware of any decision of this Court to the effect that a parol contract to dispose of real estate in a particular way or to a particular person is subject, upon objection, to the equitable right of specific performance after the death of the promisor. In *East v. Dolihite,* 72 N. C., 562, in an opinion delivered by *Rodman, J.,* it was said that a person may make a contract to devise his lands in a particular way and that a court of equity in a *proper case* will enforce specific performance; also that in those states in which the doctrine of part performance is admitted such contracts will be enforced, even though not in writing, when the enforcement is necessary to prevent fraud. The doctrine of part performance, however, has no place in our jurisprudence and will not dispense with the necessity of a writing. *Albea v. Griffin,* 22 N. C., 9; *Allen v. Chambers,* 39 N. C., 125; *Ballard v. Boyette,* 171 N. C., 24. The logical result was a train of decisions declaring that a parol contract for the conveyance of land cannot be enforced to the extent of decreeing a specific execution of the agreement. *Smith v. Smith,* 60 N. C., 581; *Hall v. Fisher,* 126 N. C., 205; *Davison v. Land Co., ibid.,* 704; *Davis v. Yelton,* 127 N. C., 348; *Shepherd v. Refining Co.,* 198 N. C., 824. Not only this; the plaintiff cannot by the doctrine of estoppel *in pais* successfully claim that he is *cestui que trust* and that the defendants are trustees of the estate. This contention was made in *East v. Dolihite, supra,* to which the Court replied: "The doctrine contended for would be dangerous. It would practically convert mere words, without writing, without witnesses chosen to attest, or any solemnity, such as the law prescribes for wills, into an irrevocable will in the shape of a trust." And it may be said by analogy of reasoning that a decree for the specific enforcement of an unenforceable agreement to devise real property would be equivalent to a supersession the statute (C. S., 4131) which provides that no last will or testament shall be sufficient in law to convey or give any estate unless it shall have been written in the testator's lifetime, signed by him, and subscribed by witnesses.

The appellee insists that a contract to devise real property is not within the Statute of Frauds and that *Hager v. Whitener,* 204 N. C., 747, is authority for this position. We cannot concur in either proposition. Hager brought suit not for specific performance but for recoupment of the loss he had suffered by the intestate's failure to comply with his contract. Under the facts of that case the plaintiff had a remedy which was not defeasible by pleading the Statute of Frauds. The Court merely observed that the statute was not applicable to the facts of that case.

It is further contended that if the agreement is within the statute, the defendants waived their right to raise the question by not objecting to the introduction of evidence relating to the contracts. To this there are two answers. The defendants denied the execution of the alleged contracts, or either of them, and the denial raised issues which were submitted to the jury. In *Barnes v. Teague,* 54 N. C., 278, it was held that this plea or denial extends as well to the discovery as to the performance of the parol agreement, and that a defendant may, while he admits or confesses the parol contract, protect himself under the act from its performance by pleading the statute; and in *Henry v. Hilliard,* 155 N. C., 373, it is said: "The party to be charged may simply deny the contract alleged, or deny it and set up a different contract, and avail himself of the statute, without pleading it, by objecting to the evidence or he may admit the contract and plead the statute; and in either case the contract cannot be enforced. *Browning v. Berry,* 107 N. C., 235; *Jordan v. Furnace Co.,* 126 N. C., 147; *Winders v. Hill,* 144 N. C., 617." Moreover, the defendants do not deny that the plaintiff is entitled to some sort of relief upon the contract and for this reason they could not reasonably have objected to the evidence offered.

Although parol contracts to convey land are void and part performance cannot remove such contracts from the operation of the Statute of Frauds, in consequence of which specific execution cannot be decreed, there is a recognized theory upon which the plaintiff in the present case is entitled to relief. In *Albea v. Griffin, supra,* the Court expressed the opinion that while no action can be maintained at law or in equity for damages because of failure to perform a nonenforceable agreement, the party rendering uncompensated service has an equity which entitles him to relief. Here the deceased led the plaintiff to believe that the latter's labor and service would be rewarded by a devise of the land in question, and it would be inequitable if the estate of the deceased should be "enriched by gains thus acquired to the injury" of the plaintiff. This principle, not a right based on the nonperformance of a void contract, is the foundation of the equity; and this equity the plaintiff may enforce upon his complaint in the present action, although he prays for specific performance of the contract. The prayer does not determine the scope of the plaintiff's right to relief. *Dunn v. Moore,* 38 N. C., 364; *Capps v. Holt,* 58 N. C., 153; *Pitt v. Moore,* 99 N. C., 85; *Kelly v. Johnson,* 135 N. C., 647; *Deal v. Wilson,* 178 N. C., 600.

The trial court was correct in denying the motion for nonsuit, but as the case is to be tried again it may be expedient to advert to the rule for the assessment of damages.

The general rule is that, where services have been performed in consideration of a promise to devise real property, if the contract, as in the pending case, is not enforceable by reason of the Statute of Frauds, an action cannot be maintained on the special contract, but in case of services performed it may be prosecuted on the theory of implied *assumpsit* or *quantum meruit* to recover the value of the services rendered. Williston states the guiding principle to be as follows: "As the defendant has committed no legal wrong in refusing to perform an unenforceable contract, the plaintiff's measure of damages is based, not on the extent of his loss from the nonperformance of the contract, but on the reasonable value of what he has done. Some cases do indeed allow recovery of the contract price, but the better view is otherwise. . . . The contract price is, however, an admission of value by the defendant and as such should be admitted in evidence, though not treated as conclusive. Decisions which refuse altogether to admit the agreed price in evidence cannot be supported; and it is probable that in some at least of the jurisdictions which have allowed recovery of the contract price as such, the rule may be restricted so far as to involve a recognition of the principle that the plaintiff's recovery is based not on the contract but on an obligation imposed by law because of the benefit received. It is to be observed, however, that the price fixed in the promise is fixed beforehand, and where the amount of the plaintiff's performance is at that time uncertain or contingent it may turn out that the promised price will bear no relation to the value of the plaintiff's actual performance." 1 Williston on Contracts, sec. 536.

The rule as thus stated was followed in *Faircloth v. Kenlaw,* 165 N. C., 228. There the plaintiff at the defendant's request sold seventy acres of land for him in consideration of the defendant's oral promise to convey to him the remaining four acres. The defendant refused to make the conveyance. The plaintiff brought suit, alleging that the four-acre tract was reasonably worth $250, and the defendant pleaded the Statute of Frauds. After saying that the defendant could not escape liability for the value of the plaintiff's services, *Walker, J.,* adhering to the rule as given by Williston, proceeded as follows: "The serious question in the case, therefore, is, what is the measure of damages, and how are they to be proved? We think it clear that plaintiff is entitled to recover only the value of his services in selling the land, and not the value of the land as the legal measure of his recovery. Cyc. of Law and Procedure, at p. 300 says: 'In an action to recover the value of services rendered on a void contract, the price agreed by parol to be paid is admissible on the question of the value of the services, and this rule has in some cases been carried to the extent of holding the agreed price to be the measure of damages; but the better rule would seem to be that while the agreed price may be admissible on the question of the value of the services, it does not control it and is not necessarily the measure of damages.' And for this statement of the law many cases are cited in the notes as supporting the text. If plaintiff were permitted to recover the value of the land, without regard to the value of his services we would be practically allowing a recovery for breach of a contract void under the statute, and this would not do, for the latter applies to an action for a breach as well as to an action for an enforcement of the contract. We take this to be the true and the sensible rule, that in a suit for work and labor performed, under a contract void by the statute of frauds, evidence of the terms of the contract with reference to plaintiff's compensation is admissible to show the value of his services, as agreed upon by the parties, but is only evidence, and not controlling as matter of law. It is for the jury to consider in making their estimate, and they may award such sum as they may find, upon all the evidence, including that drawn from the contract, is a reasonable value of the services (*Moore v. Nail Co.,* 76 Mich., 606; *Schauzenbach v. Brough,* 58 Ill. App., 526); the inquiry at last being, what are the services really worth? And the contract price is some evidence upon that question, it being in the nature of an admission or declaration of the parties as to the value, and having no more effect as evidence. It is certainly not conclusive upon the jury. Browne on the Statute of Frauds (5 ed., sec. 126)."

The rule was reaffirmed in *Deal v. Wilson, supra:* "Where services are rendered on an agreement which is void by the statute, an action will lie on the implied promise to pay for such services, and the terms of the contract are admissible as evidence of what those services are worth." So in 25 R. C. L., 307: "When by reason of the statute of frauds a parol agreement to make testamentary provision in favor of one rendering personal services cannot be enforced, an action may lie against the personal representative of the decedent on a *quantum meruit* to recover the value of the services performed, as that amount and not the value of the property agreed to be conveyed, is the measure of damages." *Vide Miller v. Lash,* 85 N. C., 52; *Whetstine v. Wilson,* 104 N. C., 384; *Patterson v. Franklin,* 168 N. C., 75; *McCurry v. Purgason,* 170 N. C., 463.

In *Redmon v. Roberts,* 198 N. C., 161, reference was made to *Bowling v. Bowling,* 300 S. W. (Ky.), 876, in which it was held that upon the facts there developed the measure of damages was the value of the property agreed to be devised; but it was expressly noted in the opinion that the measure of damages was not before us. The reference, therefore, was *obiter dictum.* In *Hager v. Whitener,* 204 N. C., 747, the rule in *Bowling's case* seems to have been applied, but to say as a general principle that the measure of damages for failure to comply with a verbal promise to devise land is the value of the property agreed to be devised is not in accord with the decisions of this Court.

New trial.

R. J. McCARLEY v. C. K. COUNCIL AND I. J. SUTTON.

(Filed 1 November, 1933.)

Master and Servant F a—Employee accepting award under Compensation Act may not alone maintain action against third person tort feasor.

Where an employee has accepted compensation awarded by the Industrial Commission for an injury sustained by him in the course of his employment he is barred by the Compensation Act from maintaining an action against a third person upon allegations that the negligence of such third person was the proximate cause of his injury, the employer or its insurance carrier being subrogated to the right of action against such third person to the extent of the amount of compensation paid, the employee being interested in the recovery only in the event the recovery exceeds the amount of compensation paid or for which the employer or insurance carrier is liable, and where an action is brought against such third person by the employee alone, the employee is not the real party in interest, C. S., 446, and it is error for the trial court to grant the employee's motion to strike from defendant's answer allegations setting up the defense that plaintiff had been awarded compensation by the Industrial Commission for the injury sued on. C. S., 537. The order granting plaintiff's motion to strike from the answer allegations setting up the award of the Industrial Commission is reversed without prejudice to plaintiff to move that the insurance carrier be made a party plaintiff.

APPEAL by defendants from *Finley, J.,* at May Term, 1933, of CLEVELAND. Reversed.

This is an action to recover damages for personal injuries suffered by the plaintiff, and resulting from a collision, which occurred on 27 January, 1932, between an automobile in which the plaintiff was riding as a passenger, and an automobile owned by the defendant, I. J. Sutton, and driven by the defendant, C. K. Council.

It is alleged in the complaint that the automobile in which the defendants were riding, at the time of the collision, was under their joint control, and that the defendants at the time were engaged in a joint enterprise. It is further alleged that the collision between said automobiles, with the resulting injuries to the plaintiff, was caused, solely and proximately, by the negligence of the defendants, as specifically alleged therein. On the cause of action alleged in the complaint, the plaintiff prays judgment that he recover of the defendants the sum of $15,000, the amount of his damages.

In their answer to the complaint, the defendants deny all the allegations therein, which constitute the cause of action alleged in the complaint. As a further defense to the cause of action alleged in the complaint, and as a bar to plaintiff's recovery thereon in this action, the defendants allege:

"1. That on 27 January, 1932, and for a considerable length of time prior thereto, the plaintiff was employed by Stewart Brothers Cotton Company.

2. That prior to 27 January, 1932, the plaintiff and his employer, Stewart Brothers Cotton Company, had duly elected to accept and be governed by all the provisions of the laws of the State of North Carolina, known as the "Workmen's Compensation Laws of North Carolina."

3. That on 27 January, 1932, the plaintiff and his employer, Stewart Brothers Cotton Company, had duly complied with the provisions and requirements of the Workmen's Compensation Laws of North Carolina, and were operating under its terms and provisions, and were bound thereby.

4. That prior to 27 January, 1932, Stewart Brothers Company, the employer of the plaintiff, had procured a policy of insurance from or in the London Accident and Guarantee Company, as required by the Workmen's Compensation Laws of the State of North Carolina, and that said London Accident and Guarantee Company was prior to as well as on 27 January, 1932, the insurance carrier for Stewart Brothers Cotton Company under the said Workmen's Compensation Act.

5. That on 27 January, 1932, and at the time and place and on the occasion mentioned in the complaint, the plaintiff, R. J. McCarley, was engaged in the business of his employer, Stewart Brothers Cotton Company.

6. That subsequent to 27 January, 1932, the plaintiff, R. J. McCarley, and his employer, Stewart Brothers Cotton Company, and the London Accident and Guarantee Company, the insurance carrier for Stewart Brothers Cotton Company, under the North Carolina Workmen's Compensation Act, duly entered into an agreement under and pursuant to the provisions of the North Carolina Workmen's Compensation Act, by

the terms of which the plaintiff agreed to accept and the said London Accident and Guarantee Company agreed to pay to the plaintiff compensation and medical and other expenses as required and provided by said North Carolina Workmen's Compensation Act.

7. That thereafter, to wit: on 5 July, 1932, a hearing was held under and pursuant to the provisions of the North Carolina Workmen's Compensation Act before J. Dewey Dorsett, Commissioner, at Troy, N. C., and that thereafter, to wit: on 25 October, 1932, an award was duly assessed by the North Carolina Industrial Commission directing that compensation payments be made according to the agreement theretofore entered into between the plaintiff, his employer, Stewart Brothers Cotton Company, and its insurance carrier, London Accident and Guarantee Company.

8. That neither the plaintiff, nor his employer, Stewart Brothers Cotton Company, nor its insurance carrier, London Accident and Guarantee Company, appealed from the aforesaid award of the North Carolina Industrial Commission, and that the time within which an appeal can be taken or perfected has expired, and that the said award is therefore final and binding upon the plaintiff, his employer and the insurance carrier, the London Accident and Guarantee Company.

9. The defendants are advised, informed and believe and upon such information and belief allege that the London Accident and Guarantee Company has paid compensation to the plaintiff, and the plaintiff has accepted compensation from the said company under and pursuant to the terms, conditions and provisions of the aforesaid award, and the Workmen's Compensation Law of the State of North Carolina.

10. That under the provisions of the North Carolina Workmen's Compensation Law, and particularly section 11 thereof, the rights and remedies therein granted to an employee where he and his employer have accepted the provisions of said act, respectively to pay and accept compensation on account of personal injury or death by accident excludes all other rights and remedies of such employees, or their personal representatives, and the acceptance of an award under the said act is a complete bar to any alternative or further proceeding at common law or otherwise, and that the plaintiff by accepting the aforesaid award under the North Carolina Workmen's Compensation Act has thereby waived any common law or other right which he might otherwise have had to institute and to prosecute an action to recover damages for his alleged injuries, and is forever barred from prosecuting any action for said alleged injuries against these defendants, or either of them.

11. That the acceptance by the plaintiff of the aforesaid award under the North Carolina Workmen's Compensation Act for compensation for the injury or injuries alleged to have been sustained by the plaintiff at

the time and place and on the occasion mentioned in the complaint operated as an assignment to his employer or its insurance carrier, the London Accident and Guarantee Company, of all rights of the plaintiff, if any he had, to recover damages against the defendants, or either of them, on account of said injuries, and that his said employer, or its insurance carrier, the London Accident and Guarantee Company, were by operation of law by said award, and their compliance therewith, subrogated to all of the rights, if any the plaintiff had, to institute or prosecute any action or actions against the defendants or either of them, for or on account of injuries alleged by the plaintiff to have been sustained by him at the time and place, and on the occasion mentioned in the complaint.

12. That by reason of the matters and things hereinbefore set forth, the plaintiff is forever estopped and barred from instituting or prosecuting against the defendants, or either of them, any action or actions for damages for injuries alleged to have been sustained by the plaintiff at the time and place, and on the occasion mentioned in the complaint."

In apt time, the plaintiff moved the court as follows:

"1. To strike out all of the First and Further Answer and Defense, being paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, and constituting all of the First and Further Answer and Defense, as set forth in the plea in bar or abatement and answer of the defendants, C. K. Council and I. J. Sutton, in the above entitled action.

2. That the above paragraphs, constituting all of defendants' First and Further Answer, should be stricken out for that said alleged defense states a conclusion of law and puts no facts in issue.

3. That the Workmen's Compensation Act of North Carolina specifically provides that the acceptance of an award under this Act for compensation for the injury or death of an employee shall operate as an assignment to the employer of every right to recover damages which the injured employee may have against any other party for such injury or death; and that such employer shall be subrogated to any such right and may enforce the same in his own name or in the name of the employee, or his personal representative, the legal liability of such party.

That said Act further provides that the amount of compensation paid by the employer or the amount of compensation to which the assured or the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages, but any amount collected by the employer under the provisions of the section, in excess of the amount paid by the employer or for which he is liable, shall be held by the employer for the benefit of the injured employee or other persons entitled thereto, less such amounts as are paid by the employer for reasonable expenses and attorneys fees, when approved by the Commission. Said section further provides that when any employer is insured against liability for compensation with any insurance carrier and such insurance carrier shall have paid any compensation for which the employer is liable, or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer and may enforce such rights in its own name and in the name of the injured employee or his personal representative."

The motion of the plaintiff was allowed, and it was ordered by the court that all of the First and Further Answer and Defense as contained in paragraphs one to twelve, inclusive, be and the same was stricken from the answer filed by the defendants.

The defendants excepted to the order, and appealed to the Supreme Court.

Ryburn & Hoey for plaintiff.
Fred B. Helms and Frank E. Exum for defendants.

Connor, J. In *Brown v. R. R.*, 202 N. C., 256, 162 S. E., 613, it was held that the personal representative, in that case the administrator, of a deceased employee, who has accepted from the employer, or from his insurance carrier, compensation for the death of the employee, under the provisions of the North Carolina Workmen's Compensation Act, can maintain in his own name an action to recover of a third person, who by his negligence has caused the death of the employee, damages for such death. For this reason, there was no error in the order of the Superior Court in that case, striking from the answer of the defendant allegations setting up the payment and acceptance of such compensation as a defense or bar to the action. Section 11 of the Act expressly provides that in such case, the personal representative of the deceased employee may maintain the action, and that a recovery thereon shall be primarily for the benefit of the employer or of his insurance carrier, who are designated by the statute as the beneficiaries of the action, to the extent of the amount of the compensation paid for the death of the employee. The construction of the statute which supports this holding is not involved in the subsequent appeal in that case. See *Brown v. R. R.*, 204 N. C., 668, 169 S. E., 419. It was approved in *Phifer v. Berry*, 202 N. C., 388, 163 S. E., 119, and may now be regarded as settled.

In *Pridgen and U. S. Fidelity & Guaranty Co. v. Atlantic Coast Line R. R. Co.*, 203 N. C., 62, 164 S. E., 325, it was held that an employee who has accepted compensation for injury resulting from an accident which arose out of and in the course of his employment, and the insurance carrier of his employer, who has paid compensation for the injury, as awarded by the North Carolina Industrial Commission, can maintain an action against a third person, who by his negligence has caused the injury, which did not result in death, to recover damages for the injury. It is said in the opinion in that case that the allegations of the complaint in effect show that the action was begun and prosecuted by the insurance carrier, primarily for its benefit, as authorized by statute. The joinder of the injured employee did not affect the right of the insurance carrier to maintain the action. If the amount recovered in the action exceed the amount paid as compensation, the insurance carrier, as plaintiff, would hold the excess for the benefit of the injured employee. For this reason, the complaint was not subject to demurrer for misjoinder of parties or of causes of action. The cause of action alleged in the complaint was vested in the insurance carrier by the statute; the employee was interested only in the recovery, in the event the amount recovered as damages exceeded the amount of the compensation which he had received from the insurance carrier, under the provisions of the North Carolina Workmen's Compensation Act.

The instant case is distinguishable from both the *Brown case* and the *Pridgen case*. In the former case, the action was to recover damages for the death of the employee. The action was properly begun and prosecuted by his personal representative. In the latter case, the action was to recover damages for injuries suffered by the employee, which did not result in his death. The action was not begun and prosecuted, as in the instant case, by the employee, who had elected to accept compensation for his injury from his employer or from his insurance carrier, and who by such acceptance is expressly barred by the statute, of the right to recover on the cause of action alleged in the complaint.

There was error in the order in the instant case, striking from the answer the allegations which constitute the First and Further Defense to the cause of action on which plaintiff demands judgment. If these allegations are sustained at the trial, the plaintiff in the present state of the record cannot recover in the action. The plaintiff is not the real party in interest. C. S., 446. For that reason, at the close of the evidence, the plaintiff would be nonsuited. *Chapman v. McLawhorn,* 150 N. C., 166, 63 S. E., 721. The allegations are not irrelevant, and should not be stricken from the answer. C. S. 537.

The order is reversed, without prejudice to a motion which may be made by the plaintiff in the Superior Court that the insurance carrier be made a party plaintiff to the action, if he is so advised. *Cunningham v. R. R.,* 139 N. C., 427, 51 S. E., 1029. If such motion is allowed, and the insurance carrier files a complaint and prosecutes the action, the action may be maintained. If the insurance carrier declines to prosecute the action, the plaintiff may not be without a remedy.

Reversed.

STATE v. JUNE WILSON.

(Filed 1 November, 1933.)

1. **Arson C c—Evidence of defendant's guilt of wantonly and wilfully burning barn held sufficient.**

In this prosecution for wilfully and wantonly burning a barn in violation of C. S., 4242, the evidence of the felonious origin of the fire and of the identity of the defendant as the culprit is held sufficient to be submitted to the jury, the *corpus delicti* being reasonably inferable from the circumstances, and there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in the presence of officers, under circumstances calling for a reply, that defendant had committed the crime.

2. **Criminal Law G f—Failure of defendant to answer accusations under circumstances of this case held competent as implied admission.**

In this prosecution for wantonly and wilfully burning a barn, defendant's brother, in the presence of the officers, after looking at defendant's boot track found at the scene of the crime, charged defendant with having burned the barn, to which defendant made no reply: *Held,* the accusation was made under circumstances calling for a reply by defendant, and was competent evidence of defendant's guilt.

3. **Same—Undenied accusation is incompetent unless made under circumstances naturally calling for denial from defendant.**

In order for a defendant's failure to answer an accusation of committing a crime or complicity therein to be competent in evidence against him in a prosecution for such crime, it must be shown that defendant heard and understood the accusation, and that it was made under circumstances naturally calling for an answer, and that defendant had opportunity to act or speak, and defendant's silence must amount to an admission by acquiescence.

4. **Same—It is not essential that person making accusation be competent as witness in order for undenied accusation to be competent.**

It is not essential that the person accusing another of the commission of or complicity in a crime should be competent to testify against defendant in order for the undenied accusation to be competent against defendant where the circumstances are such as to naturally call for a denial by defendant, though the incompetence of the accuser as a witness may be a circumstance to be considered.

5. **Criminal Law L e—Admission of testimony of undenied accusation of three-year-old girl held not prejudicial.**

Defendant, having been accused by his brother of burning prosecuting witness's barn, under circumstances naturally calling for a denial, went to the home of the prosecuting witness and sought to engage him in conversation concerning the fire. While defendant and prosecuting witness were talking the prosecuting witness's three-year-old granddaughter made an accusation implicating defendant as the culprit. Defendant did not

deny the accusation and left shortly thereafter. *Held*, the admission in evidence of the undenied accusation of the three-year-old girl was not prejudicial to defendant, it being merely cumulative of the competent undenied accusation of defendant's brother, and the jury having a full understanding of the circumstances under which the accusation was made, and being able to judge whether defendant's silence and abrupt departure were due to his inhospitable reception and the irresponsibility of his accuser. Whether the competency of an undenied accusation is exclusively a question of law for the Court, *quære?*

APPEAL by defendant from *Warlick, J.*, at July Term, 1933, of BURKE.

Criminal prosecution tried upon indictment charging the defendant with wantonly and wilfully burning a barn, the property of W. A. Lowman, in violation of C. S., 4242.

W. A. Lowman is a farmer living in Burke County. His barn was burned about 1:00 a.m. Sunday morning, 9 April, 1933. His horses were saved, but his cow was not. The defendant is a fisherman living in a shack on the western bank of the Catawba River.

A fresh boot track was found not far from the barn which led across the bottom and in the direction of June Wilson's shack. It is in evidence that this track was made by the defendant's boots. The defendant thought the track might have been made on Saturday afternoon as he was going after some liquor. He said to one of his neighbors between 2:00 and 3:00 o'clock Sunday morning, "I played hell up the creek tonight." And when the officers came to his house, or shack, later in the morning and said to him that Mr. Lowman's barn was burned last night, "he did not make any answer to that, but said they played hell with my fish trap last night." Bob Wilson, brother of the defendant, who was with the officers and neighbors, after looking at the boots, said to the defendant: "You are the fellow that burned Mr. Lowman's barn." To this, the defendant made no reply.

On the following day the defendant stopped by the home of W. A. Lowman, sat down on the edge of the porch, and sought to engage him in a conversation with respect to the cost of his new harness, etc. Lowman had very little to say; did not answer his questions. Presently, Lowman's little three-year-old grandchild said to the defendant: "You burned our cow." The defendant made no answer, but pretty soon thereafter he got up and left. Objection by defendant to the introduction of this evidence; overruled; exception.

The defendant offered no evidence, but moved to dismiss the prosecution as in case of nonsuit. C. S., 4643.

Verdict: Guilty.

Judgment: Thirty months on the roads.

The defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

D. L. Russell for defendant.

STACY, C. J. The defendant grounds his motion for dismissal of the prosecution on the insufficiency of the evidence to show any felonious origin of the fire, or to identify the defendant as the culprit, citing *S. v. Church,* 202 N. C., 692, 163 S. E., 874, but we think these facts, or the *corpus delicti,* may reasonably be inferred from the attendant circumstances. Not only does it appear that the defendant made the tracks found near the barn, but also that he remained silent in the face of the statement by his brother, in the presence of the officers, "You are the fellow that burned Lowman's barn." *S. v. Jackson,* 150 N. C., 831, 64 S. E., 376. The occasion was such as to call for a reply, or to render the defendant's silence at that time tantamount to an admission by acquiescence of the truthfulness of said statement. *S. v. Burno and Portee,* 200 N. C., 142, 156 S. E., 783.

The general rule is, that statements made to or in the presence and hearing of a person, accusing him of the commission of or complicity in a crime, are, when not denied, admissible in evidence against him as warranting an inference of the truth of such statements. 1 R. C. L., 479.

It is the occasion, colored by some circumstance or significant conduct on the part of the accused, which renders such statements, otherwise incompetent as hearsay, admissible in evidence. *S. v .Evans,* 189 N. C., 233, 126 S. E., 607.

Indeed, it has been said that the acquiescence of a party, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party, and whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must not only be such as afford him an opportunity to act or speak, but such also as would properly and naturally call for some action or reply, from men similarly situated. Taylor on Evidence, sec. 733.

When a statement is made, either to a person or within his hearing, implicating him in the commission of a crime, to which he makes no reply, the natural inference is that the imputation is perhaps well founded, or he would have repelled it. *S. v. Suggs,* 89 N. C., 527. But the occasion must be such as to call for a reply. "It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used, even though he remained silent; but it is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it." 16 C. J., 659.

Silence alone, in the face or hearing of an accusation, is not what makes it evidence of probative value, but the occasion, colored by the conduct of the accused or some circumstance in connection with the charge, is what gives the statement evidentiary weight. *S. v. Burton,* 94 N. C., 947; *S. v. Bowman,* 80 N. C., 432. "To make the statements of others evidence against one on the ground of his implied admission of their truth by silent acquiescence, they must be made on an *occasion* when a reply from him might be *properly expected.* But where the *occasion* is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence." *Ashe, J.,* in *Guy v. Manuel,* 89 N. C., 83.

Due to the manifold temperaments of people and their varying conceptions of the fitness of things, the character of evidence we are now considering is so liable to misinterpretation and abuse that the authorities uniformly consider it as evidence to be received with great caution and, except under well recognized conditions, hold it to be inadmissible altogether. Hence, unless the party at the time was afforded a fair opportunity to speak, or the statements were made under circumstances and by such a person as naturally called for a reply, the evidence is not admissible at all. *S. v. Jackson,* 150 N. C., 831, 64 S. E., 376. "The silence of the accused may spring from such a variety of motives, some of which may be consistent with innocence, that silence alone is very slight evidence of guilt; and, aside from the inference which may arise from the attendant circumstances, should be received with caution as proof of guilt." Underhill Crim. Ev. (3d ed.), sec. 209. It is readily conceded that "mere shadows of confessions," which arise from silence in the face of accusations, are not to be received in evidence unless they amount to admissions by acquiescence. *S. v. Butler,* 185 N. C., 625, 115 S. E., 889. *Qui tacet non utique fatetur, sed tamen verum est eum non negare.* "He who is silent does not indeed confess, but yet it is true that he does not deny."

Speaking to the subject in *Vail v. Strong,* 10 Vt., 457, *Phelps, J.,* delivering the opinion of the Court, says:

"It is sometimes said that, if a fact, which makes against the party, is stated in his presence, and is not contradicted by him, his silence raises a presumption of its truth. To this position we cannot accede. The mere silence of the party creates no evidence, one way or the other. There are, indeed cases, where the silence of the party creates a presumption or inference against him; but this presumption derives all its force from the circumstances, under which the statement is made, which may call for a denial. If the party is under a moral or honorary obligation to disclose, or if his reputation or interest is jeoparded by the statement, he has a strong inducement to deny it, if he can do so with truth. His silence, under such circumstances, affords an inference against him, which is more or less strong, in proportion to the inducement to make the denial. But even here, the evidence, thus created, rests altogether upon the attendant circumstances. If, for instance, the party be engaged in defending his reputation or his rights, an assertion, bearing upon the subject under discussion, and unfavorable to him, calls for a denial, and if there be not a denial, a presumption of its truth arises. But we know of no obligation upon the party to answer every idle or impertinent inquiry. He has the right to be silent, unless there be good occasion for speaking. We cannot admit that he is bound to disclose his private affairs, at the suggestion of idle curiosity, whenever such curiosity is indulged, at the hazard of being concluded by every suggestion, which may be suffered to pass unanswered. The true rule we understand to be this;—evidence of this character may be permitted to go to the jury, whenever the occasion, upon which the declaration is made in the presence of the party, and the attendant circumstances, call for serious admission or denial on his part; but the strength of the evidence depends altogether upon the force of the circumstances and the motives, which must impel him to an explicit denial, if the statement be untrue. But if no good reason exist to call for disclosure, and the party decline to enter into useless discussion, or answer idle curiosity, no legitimate inference to his prejudice can be drawn from his silence."

Nor is it essential, though a circumstance to be considered perhaps, that the statements of complicity or accusation should be made by one competent to testify against the defendant. *S. v. Record,* 151 N. C., 695, 65 S. E., 1010; *S. v. Graham,* 194 N. C., 459, 140 S. E., 26; *S. v. McKinney,* 175 N. C., 784, 95 S. E., 162; *S. v. Randall,* 170 N. C., 757, 87 S. E., 227; *S. v. Freeman,* 197 N. C., 376, 148 S. E., 450; 1 R. C. L., 480.

If it be conceded as more probable, from the foregoing epitome of the decisions on the subject, that the remark of the little child, "You burned our cow," made on Monday after the fire when the defendant stopped at the home of W. A. Lowman and sought to engage him in a conversation, called for no reply on the part of the defendant, its admission would seem to be without material significance on the facts of the present record. The occasion is what gave it point, if it had any. The jury would not have attached any importance to the child's statement, nor the defendant's failure to notice it, but for the fact that he went to the home of the prosecuting witness and sought to engage him in conversation when he knew that he was then being accused of burning Lowman's barn, and he got up and left pretty soon after the child's remark. On the other hand, it is urged that the defendant's silence, as well as his conduct, on this occasion was but natural in view of the inhospitable reception accorded him by the prosecuting witness. So the jury, at least, had the benefit of a full understanding of the situation.

The weight of the circumstance, if any it had, lies in the conduct of the defendant, and not *per se* in the remark of the little child. At any rate, this evidence was only cumulative, the same implication having been made by the defendant's brother on the day previous under circumstances which clearly called for a reply but which elicited no answer, and we are not disposed to regard its admission as harmful, even if its exclusion might have been more appropriate. Then, too, the defendant's silence on this occasion was readily susceptible to explanation, which he elected not to make, evidently regarding the matter of small moment. 2 Wigmore on Evidence (2d ed.), 555.

Speaking generally to a somewhat similar situation in *S. v. Bowman*, 80 N. C., 432, *Ashe, J.*, delivering the opinion of the Court, seems to have taken a middle course, as it were, and approved the trial court's submission of the matter to the jury:

"The prisoner excepted to the admission of the declarations of Eliza Jane Bowman, the daughter of the prisoner, in reference to the 'last words' of her mother, the deceased. They were clearly admissible for the purpose for which they were proved, and the remarks of his Honor in commenting upon this testimony before the jury were perfectly legitimate. They were told it was for them to determine whether the declaration was made in the hearing of the prisoner, whether he heard and understood the statement, and if so, what was his conduct on the occasion; did he immediately take up the child and bear her away in his arms and keep her constantly in his immediate presence while the company remained; and if they believed his testimony, it was for them alone to say what value was to be attached to these circumstances as tending to prove the prisoner's guilt. *S. v. Perkins*, 3 Hawks, 377."

This view of the law has been followed in a number of later cases. *S. v. Martin*, 182 N. C., 846, 109 S. E., 74; *S. v. Walton*, 172 N. C., 931, 90 S. E., 518; *S. v. Burno and Portee, supra.* But in *S. v. Butler, supra*, the competency of such proposed evidence was ruled as a matter of law for the court, opinion by *Walker, J.*

We find no error in the court's refusal to set aside the verdict for alleged misconduct of one or more of the jurors. The verdict and judgment will be upheld.

No error.

CITY OF WASHINGTON AND JOHN B. SPARROW, SINKING FUND COMMISSIONER OF THE CITY OF WASHINGTON, NORTH CAROLINA, v. THE TRUST COMPANY OF WASHINGTON AND NATIONAL SURETY COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ADDITIONAL PARTY.

(Filed 1 November, 1933.)

1. **Principal and Surety B c—**

As a general rule a surety's liability on the bond of a public officer ceases when the term of office of the principal expires by operation of law.

2. **Same—Rule that public official's bond covers whole term of office may be modified by contractual provision to contrary.**

While the statutory bond of a public officer must be written in accordance with the provision of the applicable statute, and any discrepancy will usually be treated as an irregularity and void, C. S., 324, this rule does not preclude the parties from contracting in the bond for liability for a shorter period than the official term of office of the principal.

3. **Same—Bond in this case held to cover period of one year although principal's term of office was six years.**

The board of aldermen of a city appointed a trust company as sinking fund commissioner for the term of six years. Defendant surety company executed the bond required of the commissioner by statute, the bond reciting that the principal had been appointed sinking fund commissioner for the term of one year, and being conditioned upon the faithful performance of the commissioner's duties. At the expiration of the first year of the commissioner's term another surety executed a bond covering the whole six year term, the board of aldermen being given statutory power to examine all bonds yearly and renew them if the security was impaired or adjudged insufficient, and the bonds not being made cumulative by reason of renewal, sec. 82, chap. 170, Private Laws of 1903. *Held*, defendant's bond covered a period of one year only, and the city accepted the bond with knowledge of this fact.

4. **Limitation of Actions B a—Statute held to run against surety on official bond from expiration of contractual period of bond.**

Where the official bond of a public officer by valid contractual limitation covers only the first year of the official's six-year term of office, the statute of limitations begins to run in favor of the surety on the bond from the expiration of the first year of the official's term of office and not the expiration of the official's statutory six-year term of office. C. S., 439.

APPEAL by Fidelity and Deposit Company of Maryland, from *Barnhill, J.*, at May Term, 1933, of BEAUFORT. Reversed.

On 3 August, 1932, the plaintiffs brought suit against the Trust Company of Washington and the National Surety Company. They filed a complaint alleging that on 9 May, 1921, the Trust Company of

Washington was appointed sinking fund commissioner of the city of Washington, and received from its predecessor in office certain moneys and securities for which it had not accounted; that the plaintiff Jno. B. Sparrow, is the present sinking fund commissioner of said city; that as surety for the Trust Company the National Surety Company executed a bond in the sum of $75,000 conditioned that said Trust Company should faithfully and truly perform all the duties of its office and pay over and account for all funds coming into its hands by virtue of its office as sinking fund commissioner; and praying that the plaintiffs recover of said Trust Company the sum of $150,000 and of the National Surety Company the sum of $75,000, to be discharged upon the payment of any balance that may be found due the plaintiffs upon an accounting. These two defendants filed an answer denying liability.

On 19 August, 1932, the Fidelity and Deposit Company of Maryland was made a party defendant. The plaintiffs then filed a supplemental complaint and the Fidelity and Deposit Company made a motion to dismiss the action on the ground that it had executed its bond for a term of one year only, at the expiration of which its bond was canceled and a bond with the National Surety Company was accepted. Reserving its rights under the foregoing motion, the Fidelity and Deposit Company of Maryland filed an answer denying the material allegations of the supplemental complaint and pleading the statute of limitations in bar of the plaintiffs' recovery. The plaintiffs filed a reply to the appellant's motion and answer and the appellant demurred *ore tenus* to the complaint for the asserted reason that it does not state a cause of action. The pertinent clauses of the bond filed by the Fidelity and Deposit Company of Maryland are set out in the opinion.

The court overruled the demurrer *ore tenus* and the Fidelity and Deposit Company excepted and made a motion for judgment upon the pleadings, which was denied. Thereupon the court of its own motion referred the case to a referee with directions to state an account and make report of his findings and conclusions of law. The order of reference was held in abeyance as to the Fidelity and Deposit Company pending the appeal to the Supreme Court. To this order the Fidelity and Deposit Company excepted.

S. M. Blount and Ward & Grimes for plaintiffs.
I. C. Wright for Fidelity and Deposit Company of Maryland.

ADAMS, J. The city of Washington is a municipal corporation created and existing by virtue of an act of the General Assembly. Private Laws, 1903, chap. 170. On 9 May, 1921, in the exercise of authority conferred upon it by section 77 of this act, the board of aldermen appointed the

Trust Company of Washington as commissioner of the sinking fund of the city for a term of six years and the Trust Company entered upon the exercise of its official functions on 11 June, 1921. The act prescribes the duties of the commissioner but the appeal does not require that they be set forth here or specifically defined. It is sufficient to say that security was demanded (sec. 82) and that on 25 April, 1922, the Fidelity and Deposit Company of Maryland executed as surety for the commissioner a bond in the penal sum of $75,000, containing the following recitals: "Whereas, the said Trust Company of Washington, North Carolina, was on 15 March, 1922, duly appointed by the board of aldermen of the city of Washington, North Carolina, as sinking fund commissioner for the city of Washington, North Carolina, for the term of one year beginning 15 March, 1922: Now, therefore, the condition of this obligation is such, that if the said Trust Company of Washington shall well and faithfully discharge the duties of the office aforesaid, then this obligation to be void, otherwise to be and remain in full force and virtue."

On 15 March, 1923, the National Surety Company, authorized to become sole surety on bonds in the State of North Carolina, executed its bond in the penal sum of $75,000 as surety for the commissioner, containing a recital of six years as the term of office and conditioned for the faithful performance of all the official duties of the commissioner and the payment of all funds coming into its hands by virtue of its office; and on 15 March, 1929, the National Surety Company executed another bond in the same sum as surety, reciting the commissioner's election to the office for a term of one year beginning 15 March, 1929, and ending 15 March, 1930, "or until its successor is duly elected or appointed and qualifies."

Section 82 of the act under which the city of Washington was incorporated provides that during the month of May such bonds shall be carefully examined and certified anew by the board of aldermen annually, and if the security is impaired or adjudged insufficient the bonds shall be renewed but not made cumulative by reason of the renewal.

The appellant contends that its bond covers a period of only one year; that at the end of this period its liability ceased; that the complaint does not state a cause of action; that the action against the appellant was instituted on 19 October, 1932; and that it is barred by the statute of limitations.

The plaintiffs say that the appellant's bond was in effect from 11 June, 1921, to 11 June, 1927, the term for which the commissioner was appointed, and that it protects liabilities accruing between these dates—certainly since 15 March, 1922; that the bond of the National Surety Company "covers any breach during the entire period"; that in any event the appellant is liable for default alleged to have occurred between 25 April, 1922, and 25 April, 1923; and finally, that the cause of action is not barred by the lapse of time.

As a general rule a surety's liability on the official bond of a public officer ceases when the term expires by operation of law. The question was presented for the first time in *Arlington v. Merricke,* 85 Eng. R., 1215, 1221, in which *Chief Justice Hale* held that the sureties on a bond taken by the Postmaster-General from one of his deputies was not liable for defaults occurring after the period of the deputation; and the rule there stated has been generally followed by the courts of this country. Annotation, 81 A. L. R., 10. In his Treatise on the Law of Public Officers, sec. 205, Throop says: "With respect to the time when the liability of the sureties expires, the general rule is that in the absence of any designation of another limit, either in the bond itself, or in the statute under which it is given, the sureties are responsible only for defaults of the principal occurring before the end of the official term which he is serving, or is about to serve, when the bond takes effect"—a principle which is maintained by the decisions of this Court. A surety is answerable only for the period over which his bond extends. *Fitts v. Hawkins,* 9 N. C., 394; *Banner v. McMurray,* 12 N. C., 218; *Keck v. Coble,* 13 N. C., 489; *Miller v. Davis,* 29 N. C., 198; *Holloman v. Langdon,* 52 N. C., 49; *Prince v. McNeill,* 77 N. C., 398; *S. v. Martin,* 188 N. C., 119.

True, in these cases the official term was fixed by law, and it may be conceded that in the absence of other limitation liability on the bond of a public officer is coextensive with the tenure of office; but here we are confronted with the question whether the general rule is modified or affected by the statement in the appellant's bond that the Trust Company had been appointed as sinking fund commissioner "for the term of one year beginning 15 March, 1922."

We are aware of the doctrine that official bonds should be liberally construed and that any variance in the condition of such an instrument from the provisions prescribed by law will usually be treated as an irregularity. C. S., 324. But this principle does not abrogate the freedom of contract. A bond is a contract between the parties and obligations of the parties are generally not extended by construction beyond their specific engagements. The theory of a surety's liability to the end of the term may be modified by a contractual limitation of time, and the solution of the question is often found in the language of the bond. Murfree on Official Bonds, secs. 80, 88, 132, 801; Mechem on Public Officers, secs. 282, 286; Throop's Treatise, sec. 193. Where by the language of the bond the liability of sureties is limited to only a portion of the term, such limitation will be observed. *Webster v. Jossman,* 165

N. W. (Mich.), 802. "The condition of a bond is frequently preceded by a recital of certain explanatory facts, and in such case, if a certain particular thing be referred to, the recital will operate against the parties to the bond as a conclusive admission of the fact recited; and these recitals will frequently operate in restraint of the condition, though the words of it imply a larger liability than the recital contemplates. *Pearsall v. Summersett,* 4 Taun., 523; *Payler v. Homesham,* 4 Maule & Sel., 425; Hurlston on Bonds, 9 Law Lib., 17, 18. In the latter case *Lord Ellenborough* observes that the general words of a clause may be restrained by the particular recital. 'Common sense,' he says, 'requires it should be so; and in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it.' These cases are cited to show that the meaning of the parties as gathered from the instrument itself is the governing rule in the construction of obligations, and that in those accompanied with a condition, where the meaning is doubtful, such a construction must be put upon them as is most favorable to the obligors." *Bennehan v. Webb,* 28 N. C., 57.

In *Prince v. McNeill, supra,* the plaintiff brought suit on the bond of a sheriff and contended that the defendant instead of giving a bond for 1872 and 1873 should have given one for the whole term, which would have included the year 1874 when he made default. Rejecting this contention the Court said: "It is insisted that under that statute (C. S., 324) the conditions of the bonds sued on are to be enlarged and construed as if they embraced in express terms the year 1874, or the whole term of office; that as soon as the defendants executed the bonds, the law prescribed the conditions without regard to the conditions as expressed in the bonds. If the statute had been intended to be as broad as that, then the statute itself ought to have set out the conditions, so that the obligors could have known what obligation they were incurring."

We deem it apparent in the present case that the appellant intended to execute a bond for the period of one year and that the city accepted the bond with knowledge of this fact. Our conclusion is fortified by the circumstance that at the expiration of one year from the date of the bond the National Surety Company executed its bond for the term of six years.

If the principal defaulted while the appellant's bond was in effect the plaintiff could have brought suit at any time after 15 March, 1923. *Washington v. Bonner,* 203 N. C., 250. The appellant was made a party to the action on 19 October, 1932. Of course the statute of limitations is a matter of defense (*Drinkwater v. Tel. Co.,* 204 N. C., 224); but here there is no controversy as to the material facts relating to this question. Between 15 March, 1923, and 19 October, 1932, there was a lapse of more than six years. C. S., 439. Upon consideration of the whole record we are of opinion that the plaintiffs cannot prevail and that the action should be dismissed. Judgment

Reversed.

CARL E. SMITH v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 1 November, 1933.)

1. **Trial D a—Upon motion of nonsuit all the evidence is to be considered in the light most favorable to plaintiff.**

   Upon a motion as of nonsuit all the evidence, whether offered by plaintiff or elicited from defendant's witnesses is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Insurance R c—Ability to do odd jobs of comparatively trifling nature will not prevent recovery on disability provision of policy.**

   An employee, insured under a group life insurance policy, brought suit on the provision of the policy providing for the payment of a certain sum monthly if insured should become "totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation or financial value." Plaintiff's evidence tended to show that he had consumption in an advanced stage, and that any physical exertion rendered his condition worse, and that plaintiff, a paint foreman, after his discharge for the disability sued on, did odd paint jobs netting him $67.00 over a period of a year and a half in order to provide some support for his wife and children: *Held*, after charging that the burden of proof was on plaintiff and that the disability must have prevented plaintiff from engaging in any occupation or performing any work for compensation, etc., it was not error for the court to charge that if plaintiff performed some work now and then of a trifling nature and thereby greatly reduced his strength and aggravated his disease, it would not be precluded recovery.

3. **Insurance P b—Under facts of this case failure to introduce group policy held not fatal in action on individual certificate.**

   Where in an action by an employee on a group policy of life insurance, he introduces his individual certificate in evidence, his failure to introduce the group policy in evidence will not preclude recovery where the insurer admits in its answer that it had issued its individual certificate with the disability benefits sued on, and admits in evidence that it would be liable thereon if plaintiff were totally and permanently disabled within the meaning of its terms, and it appearing that insurer did not set up this defense in its pleadings, and the court's charge that if plaintiff applied to the company for information as to how to make out his claim and they told him he

would have to fill out certain blanks, and that he was out of them, and plaintiff filed a claim in his own handwriting, the best he could do under the circumstances, that it would be a substantial compliance with the requirements of the policy in this respect *is held* not prejudicial.

Appeal by defendant from *Alley, J.,* and a jury, at April Term, 1933, of Buncombe. No error.

This is an action brought by plaintiff against defendant to recover $503.50 for total permanent disability on a group life insurance policy, which also provided on death $500 payable to his wife, issued to him, dated 1 November, 1929—No. 3215-88. The material provisions of the policy to be considered, are as follows:

"(1) The insurance upon the life of any employee shall automatically cease upon the termination of his employment with the employer in the specified classes of employees, etc.

(2) Total and permanent disability provision: In the event that any employee, while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the society will, in termination of all insurance of such employee under the policy, pay equal monthly disability installments, etc.

(3) The first payment shall be due upon receipt of said proofs and shall be for the amount of monthly disability installments accrued from the commencement of said total and permanent disability, and subsequent installments shall be paid monthly during the continuance of such disability until the completion of said installments."

The defendant denied liability and for a defense alleged: "that said individual certificate No. 3215-88 provides, among other things, that defendant's liability thereunder shall automatically cease upon the termination of the insured's employment with the employer in the specified class of employees. That on 27 August, 1931, American Enka Corporation, employer of the plaintiff, discharged said plaintiff for general unsatisfactory services; that the said plaintiff worked every day up to the date of said discharge, and was in good health and physical condition on said date and prior thereto," etc.

Defendant's witness Cooke, the paymaster, testified: "We paid him (plaintiff) the regular monthly salary for September." Again witness Cooke says "We paid him another two weeks salary on 15 September." Again says the same paymaster: "He came two weeks later and got a pay check." And defendant's witness Heykoop, an official of the company, testified: "He was to be paid to the end of September."

Plaintiff testified in part: "I paid the amount on this policy up until 30 September, 1931. Q. I hand you a piece of paper. I would like for you to state, if you can, what that is? A. I cannot see. A. (Examining under electric light): That is a stub of my check given me on 1 September, paying me up to and through 15 September, 1931, where the insurance shows up to be deducted there for the month of September. (Mr. Wright): I wish to read one item: 'Deductions, insurance $2.70.' (The Court): You can find if he has any other insurance. It must be connected with this, or I will strike it out. Still I see no necessity for pursuing that line when the defendant admits that they are liable if you show disability. (Mr. Wright): If they will admit it in the record. (Mr. DuBose): We say the insurance policy was in force according to its terms, from the day it was issued until the date of the termination of his employment, just exactly as the policy reads, whether he paid a nickel or $50.00. (The Court): You admit if he incurred or sustained total disability within that time, you would be liable for it? (Mr. Bernard): Yes." Plaintiff continued: "I began working for the American Enka Corporation 13 May, 1929, at 7:30, and continued working there until 27 August, 1931, when I was relieved from duty, but continued on the payroll until to and through 30 September, 1931. My duties were paint foreman in charge of paint when I began, and I continued in the same capacity all the time as paint foreman. . . . I was drawing full pay up to 30 September, 1931. The company relieved me from 27 August, 1931. . . . They did not require any work of me. I didn't pretend to work. . . . After that my physical condition got worse. Mr. Heykoop complained to me on two or three different occasions before that. Nobody else made any complaint to me. Mr. Gills called me in the office. He was the plant manager, production manager is the way he was rated, and he called me in his office and said to me, 'Mr. Smith, we are mighty sorry to have to do this, and we are especially sorry for your large family, and for this reason we are going to continue to pay you through the month of September, that you might have a long rest or vacation, whichever one you want to call it.'"

The evidence of plaintiff was to the further effect that during the period of over two years plaintiff worked for the company he was subjected to breathing sulphuric acid and ammonia fumes and gases, which adversely affected his lungs, throat and eyes; his back was strapped with adhesive tape and he went to Enka Hospital for treatment on a number of occasions; and in July, 1931, plaintiff informed one of the officials of the company that his physical condition had gotten so bad that he was unable to take care of his job. Plaintiff developed tuberculosis and his eyesight became very greatly impaired, so that in January, 1932, nine-tenths of his eyesight was gone and could not be recovered.

Dr. C. D. W. Colby, a witness for plaintiff, admitted a medical expert and a specialist on tuberculosis, testified in part: "At the time I examined Mr. Smith, 30 September, 1931, my recommendation and orders to him were to rest. It is impossible to give an opinion as to the duration of this physical condition prior to 30 September. Q. How long, in your opinion, had it existed? The whiteness of the nodes would indicate some long time, but the fuzz that surrounds the smaller branches of bronchial tree was of more recent date. I could not be exact. At the time I examined Mr. Smith I did not consider him fit to perform any physical labor without undue exhaustion."

Dr. S. S. Fay, a witness for plaintiff, a medical expert, testified in part: "I first examined Mr. Smith between 1 and 10 January, 1932. I don't know the exact date. . . . His retina is practically destroyed, and that particular tissue is never regenerated, so on vision alone, I consider him totally disabled. I did take the trouble to examine his chest, though he told me that he was under Dr. Colby's care there. He had bronchial breathing all over the chest on the left side, and at that time he had a dry pleurisy and some little cavity over his chest. He was troubled also with gastric trouble. The two things permanent I considered the chest and the vision as the disability. The others were side issues. I saw him last about the last of March. Q. Have you an opinion satisfactory to yourself as to whether or not the plaintiff, Carl E. Smith, is now permanently and totally disabled? A. Yes, I have an opinion. Q. What is that opinion? A. I believe that he is totally disabled from either point of view, either from chest or vision, that is, as to being capable of any gainful occupation. Both of them are permanent. I have an opinion satisfactory to myself as to whether or not this same condition that now exists, existed back in August, 1931, and September, 1931. Q. In your opinion, was the trouble that you found there of recent origin, or of some long standing? A. I should say that the chest condition was of long standing, because fibrous tissue to that extent cannot be formed in a short time. Q. How long do you think it would take to form that condition? A. It would be hard to put a definite time, but I would say a year or two; but as to the immediate activity nobody can say how long that took, but the old fibrous tissue was there for over a year. . . . He might be able to see to mix paint, but he is not physically able to do the painting, has not strength enough to do it, if he could do it, so that really the mixing is inconsequential. Any kind of work or exertion would wear him out very quickly. He has comparatively a small amount of lung tissue that is normal now, and it would just aggravate the condition and make it worse. His chest condition will never be any better, and if he exerts himself, it would just make it worse."

Plaintiff, after leaving the Enka Corporation suffering with tuberculosis, with a wife and seven children dependent upon him, in his depleted condition, attempted to earn a little money to buy something to eat. He obtained minor jobs of part-time work. About half of the money going for paint and about two-thirds of the balance for labor. Plaintiff retained not over $67.00 for what work he attempted to do, and this amount received covered a period of about a year and a half.

Numerous exceptions and assignments of error were made by defendant in the court below, the material ones will be considered in the opinion.

Edward N. Wright and Eugene Taylor for plaintiff.
Bourne, Parker, Bernard & DuBose for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant made motions for judgment as of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error. It is the well settled law in this jurisdiction that on a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

The first issue submitted to the jury was as follows: "Did the defendant issue and deliver to the plaintiff certificate of policy of insurance No. 3215-88, dated 1 November, 1929, as alleged in the complaint?" This issue was answered by consent "Yes." It was admitted that the premium on this policy was paid to 30 September, 1932.

The second issue is as follows: "Did the plaintiff prior to the termination of his employment with Enka Corporation become totally and permanently disabled by bodily injury or disease whereby he will presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation or financial value, as alleged in the complaint?" The jury answered "Yes" to this issue.

On this issue the court below, after placing the burden of the greater weight of the evidence on plaintiff and defining same, charged the jury in part: "On that issue I charge you that the language in the contract or policy of insurance means what it says. It means that if the plaintiff, prior to the termination of his employment with Enka Corporation, became totally and permanently disabled by bodily injury or disease so that thereby he will presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation or financial value, then, in that event, he would be entitled to be reimbursed by sums and amounts as provided in the policy, otherwise he would not be so entitled. . . . The language of the policy does not, however, mean merely that this disability may incapacitate the plaintiff from pursuing his usual avocation, that is, working as foreman of the painters crew, or from pursuing his trade as a painter by working with his own hands, but the language of the policy means that he must be totally and permanently disabled by bodily injury or disease whereby he will presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation or financial value. . . . I charge you, however, that the ability to do odd jobs now and then of comparatively trifling nature would not preclude his recovery. He might do some work of a comparatively trifling nature under some circumstances, yet be totally disabled within the meaning of that clause, in the language of the insurance policy sued on in this case. (If, for instance, he performed some work now and then of a trifling nature, which was not in pursuance of ordinary care and thereby aggravated the physical trouble of which he complains, and greatly reduced his strength, the fact that he performed such work would not preclude his recovery.)" To the latter part of the above charge in brackets, an exception and assignment of error was made by defendant. We do not think it can be sustained, taken in connection with the prior portion of the charge.

In *Lee v. Ins. Co.,* 188 N. C., 538, the language of the policy was: "Wholly incapacitated and thereby permanently and continuously prevented from engaging in any avocation whatsoever for remuneration or profit." The plaintiff was allowed to recover although he could attend to minor matters.

In *Bulluck v. Ins. Co.,* 200 N. C., 642 (646), speaking to the subject, we find: "The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions and the decisions of courts generally, have established the principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.'" The language in the Bulluck policy was: "*Total Disability:* Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the insured to follow a gainful occupation."

In *Green v. Casualty Co.,* 203 N. C., 767, the language of the policy was : "The company will pay said monthly sickness indemnity for the period not exceeding one year during which the *insured shall be wholly* *and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation by reason of sickness," etc.*

In the present case the language of the policy is: "Totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value."

The evidence in all the above cases and in the present case indicates that the jobs were of a trifling nature. Is it possible to construe a policy like the present to say that a man, although death-doomed with tuberculosis, and having a wife and seven children needing, as the plaintiff testified, "something to eat," if he should attempt in his wasted condition to try in a feeble way to do trifling work, that this was a forfeiture of his policy? Such a holding would be contrary to the spirit, if not the letter, of the contract.

The case of *Thigpen v. Ins. Co.,* 204 N. C., 551, in which the "court crier" received $40.00 a month for his services, is distinguishable.

We think the humanitarian charge of the judge in the court below is fully borne out by the decisions of this Court.

The third issue was as follows: "Did the defendant commit a breach of the terms and conditions of said policy of insurance by failing to pay the benefits provided, as alleged in the complaint? Answer: Yes."

The court below charged the jury on this issue: "The burden of this issue is likewise on the plaintiff to satisfy you by the greater weight of the evidence that his contentions in regard to that issue are true. A breach of contract in law is nothing more than a failure or refusal to perform the terms of the contract. Therefore, if you shall find by the greater weight of the evidence that the defendant in this case failed and refused to pay the benefits as required by the policy, then I charge you that such failure and refusal to pay would be a breach of contract and, in that event, it would be your duty to answer the third issue, Yes; otherwise, No."

The defendant contends that the question involved is: "Where a certificate of insurance is issued under a group insurance policy and said certificate provides that it is issued 'subject to the terms and conditions of the (group) policy,' and, 'This Individual Certificate is furnished in accordance with the terms of the Equitable Group Insurance Policy, which together with the employee's application therefor, constitutes the entire contract between the parties,' and the group policy is not offered in evidence, is the plaintiff entitled to recover?" We think so, under the facts and circumstances of this case.

On this aspect, the court below charged as follows: "If you find he applied to the company for information as to how and they told him he would have to fill out certain blanks, and that he was out of them, and he then filed a claim in his own handwriting, the best he could do under the circumstances, I charge you that would be a substantial compliance with this requirement of the policy, and in that event, you would answer the second issue, Yes, provided you find the other facts on the second issue that I have already heretofore recited to you." The defendant excepted and assigned error. We do not think this assignment of error can be sustained. Under the facts and circumstances in this case, the charge was not prejudicial. In its answer this contention was not made by defendant company, but it admitted "That it issued to the plaintiff Individual Certificate No. 3215-88 in the sum of $500.00 dated 1 November, 1929, with disability provisions as therein contained." Defendant nowhere sets up this defense and tendered no issue, and in fact only tendered the following issue, which was, in accordance with the defense set up in its further answer of defendant: "Did the plaintiff become totally and permanently disabled by a bodily injury or disease to such extent that he will be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, prior to the termination of his employment, 27 August, 1931?" The admission in the evidence is as follows: "The court: You admit if he incurred or sustained total disability within that time, you would be liable for it? The answer of defendant's attorney was Yes." *Taylor v. Ins. Co.,* 202 N. C., 659.

The facts in the case of *Ammons v. Assurance Society, ante,* 23, are different and the case distinguishable.

The admission of certain evidence, the motion to strike out answers of witnesses, the refusal of the court to submit issue tendered by defendant, the exceptions to certain portion of the charge of the court below, excepted to and assigned as errors by defendant, we do not think prejudicial.

The court below tried the case carefully and the charge fully set forth the contentions of the parties and applied the law applicable to the facts. In law we find

No error.

FRANK T. DUDLEY v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, OMAHA, NEBRASKA.

(Filed 1 November, 1933.)

1. **Insurance J b — Insured held entitled to payment of premiums out of cash value of policy under policy provisions in this case.**

   Where a policy of life insurance is issued to plaintiff, and sixteen years thereafter another policy is issued to plaintiff in lieu of the former policy, the second policy carrying a much higher premium rate because of the advanced age of the plaintiff, and providing that the nonforfeiture values of the second policy should be computed as of four years prior to the date of its issuance, and further providing that after thirty-six monthly installments of premiums had been paid the insurer, without action by the insured, would apply the cash value of the policy to the payment of premiums if necessary to keep the policy in force: *Held*, the provision as to the application of the cash value of the policy to the payment of premiums will be enforced as of the date provided on the face of the policy for the computation of the nonforfeiture values, and plaintiff was entitled to have the cash value computed and applied to payment of premiums after thirty-six months from such date, and not as of the date of the actual issuance of the policy as contended by insurer.

2. Insurance E b—

Where a policy of insurance is ambiguous and reasonably susceptible of two reasonable interpretations, it will be construed in favor of the insured.

APPEAL by defendant from *Grady, J.*, at May Term, 1933, of PITT. Affirmed.

The court below rendered the following judgment: "This cause came on to be heard at Greenville, N. C., during the May Term, 1933, upon motion by the parties for judgment upon the pleadings. It was admitted by the defendant that the plaintiff was totally and permanently disabled within the contemplation of a certain insurance policy issued to him by the defendant, and the only question to be determined was whether or not the plaintiff was barred of his rights under the facts as alleged, and the contract of insurance which includes the constitution and by-laws of the defendant corporation.

It was admitted that on .... May, 1913, the defendant issued to the plaintiff a policy of insurance, No. 27976, dated 12 May, 1913. It was admitted that on 5 August, 1929, pursuant to an application made by the plaintiff, the defendant issued to the plaintiff another policy, in lieu of the former, said new certificate or policy being No. RW-914445-L. Said new policy was exhibited to the court and is made a part of this finding of fact.

Said new policy provides upon its face that 'The nonforfeiture values shall be computed as if this certificate had been issued on 1 July, 1925.'

Said policy also provides that after thirty-six monthly installments or premiums have been paid, the defendant will, without any action on the part of the plaintiff, advance as a loan to him the amount of the monthly payments required to maintain said certificate in force, from month to month, until such time as the accumulated loans, together with compound interest thereon, at the rate of five per cent, per annum shall, equal the cash value of the said policy; and at the expiration thereof, if the plaintiff did not pay said monthly premiums the policy was to become null and void.

It is also provided in the policy that after the same shall have been in force for 12 months, and the insured was less than 60 years of age, and became totally and permanently disabled, the company would pay to him one-half of the face of said policy, which would be $500.00. It was admitted that he was under 60 years of age, and that he was totally disabled.

The policy had been in force more than three years, if dated from 1 July, 1925, as stipulated, and the cash value of the policy, computing the same from said date (1 July, 1925) would have been sufficient to pay the premiums on the same up to such time as would entitle the plaintiff to recover in this case.

All of the two policies in question, the constitution of the defendant, its by-laws, and the application for said policy and all documents referred to in the pleadings are made a part of this judgment and findings of fact.

Under the statement of facts and admissions, the court is of the opinion that the plaintiff is entitled to recover of the defendant, and it is now, adjudged that the plaintiff have and recover of the defendant the sum of $500.00, with interest thereon at the rate of six per cent per annum from 15 February, 1932, and the costs of this action to be taxed by the clerk, provided he surrenders said policy for cancellation as therein provided."

The defendant excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

S. J. Everett for plaintiff.
Albion Dunn for defendant.

CLARKSON, J. Upon the pleadings, admission and testimony, the plaintiff contended that he was entitled to have the loan value applied to the payment of his installments, and contended that the date of issue of the new certificate for the purpose of cash surrender, paid-up, and extended insurance, and loan values were available on and after 36 months, or 3 years, 1 July, 1925, and that, therefore, he had sufficient available loan value in his certificate to pay the installments due prior to proofs of disability furnished the Sovereign Camp.

On the other hand, the defendant contended, upon the pleadings, admissions and evidence, that the cash surrender, loan value, and paid-up and extended insurance were only available to the plaintiff after thirty-six monthly payments had been made on the new certificate, and that the date of issue, for the purposes of cash surrender, loan value, paid-up and extended insurance was 5 August, 1929, and that, therefore, the plaintiff became suspended, and his policy null and void when plaintiff failed to pay the installment due in August, 1931. We think the plaintiff's contention is correct, and there was no error in the judgment of the court below.

The question involved: Did the court commit error in holding that the nonforfeiture values and automatic premium loan, referred to in the certificate of insurance, were available on and after 1 July, 1928 (3 years from 1 July, 1925), and in refusing to hold that such automatic premium loan value was available only after 36 monthly payments had been made on the new certificate after the date of its issuance, to wit, 5 August, 1929? We think the interpretation of the court below correct.

In Richards on the Law of Insurance, part sec. 74, at pp. 114-115 (4th ed. 1932), the following principle is found: "The assured ordinarily has no part in the preparation of the policy. No rule of interpretation of an insurance contract is more firmly embedded than that which declares that where the language of the policy is without violence susceptible of two interpretations, one of which being that contended for by the insured, it should be most strongly construed against the insurer for the language is that of the insurer."

In *Thompson v. Phoenix Ins. Co.,* 136 U. S., 287, 34 L. Ed., at p. 297, we find: "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because these instruments are drawn by the company. *First Nat. Bank v. Hartford F. Ins. Co.,* 95 U. S., 673, 678 (24: 563, 565)." *Allgood v. Ins. Co.,* 186 N. C., 415; *Baum v. Ins. Co.,* 201 N. C., 445, *S. c.,* 204 N. C., 57.

The same principle has been set forth in this jurisdiction in *Bray v. Ins. Co.,* 139 N. C., 390 (393), as follows: "If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed. *Grabbs v. Ins. Co.,* 125 N. C., 389."

In the face of the certificate, on page 1, we find: "This certificate is issued and accepted with the express agreement that the provisions and benefits contained on this and the three succeeding pages hereof, and in any authenticated riders attached hereto, form a part of this contract as fully is if recited over the signatures affixed. *The nonforfeiture values shall be computed as if this certificate had been issued on the first day of July, 1925.* Issued at Omaha, Nebraska, this 5 August, 1929. (Signature printed) Sovereign Commander." Then there are special provisions and conditions on other pages of the certificate. The above in *italics* seems to be an exception to special provisions and conditions as to when the "nonforfeiture values" shall be computed. Then again, the last paragraph on page 2 of the certificate reads as follows: "The cash loan, paid up and extended insurance values shall not become available until three years from the date of issue, as set forth on page 1 hereof." A reasonable interpretation would indicate this to be from 1 July, 1925. On page 2 of the certificate, we find: "3. *Automatic Premium Loan.* After thirty-six monthly payments on this certificate shall have been paid, if any subsequent monthly payment be not paid on or before its due date, and if the member has not, prior to such due date, selected one of the options available under the nonforfeiture provisions of this certificate, *the association will, without any action on the part of the member, advance as a loan to the said member the amount of the monthly payments required to maintain this certificate in force from month to month until such time as the accumulated loans, together with compound interest thereon at the rate of five per cent per annum, and any other indebtedness hereon to the association equal the cash value hereof at the date of default in the payment of the monthly payments,*" etc. Plaintiff contends that under this provision the court should apply the value from 1 July, 1925.

Defendant contends that "After thirty-six monthly payments of this certificate shall have been paid," means from the issuance of the certificate—5 August, 1929, and contends also that in the application for the exchange of the old certificate for the new, is the following: "It is understood and agreed that withdrawal values, if any, on the new certificate shall be available to me only after I have made payments on said new certificate for three full years from date hereof."

It may be noted that these special provisions and conditions are in the general printed form of the certificates issued by defendant, but the Sovereign Commander solemnly wrote in plaintiff's certificate "The nonforfeiture values shall be computed as if this certificate had been issued on 1 July, 1925. Issued at Omaha, Nebraska, this 5 August, 1929." The above is on printed form except the words and figures "First," "July," "25" and "5th," "August" "29" are typed.

In the present certificate it seems that an exception was made by this fraternal organization in favor of plaintiff. The facts may indicate the reason for this: Plaintiff, 32 years old, upon application on 12 May, 1913, was issued insurance certificate No. 27976, for $1,000, rate $1.16 per month, or $13.92 per year, and on 5 August, 1929, upon application for exchange and cancellation he was, as of the age of 44, rate $2.92 per month or $35.04 per year, issued the certificate, sued upon, which states that the nonforfeiture values "shall be computed as if this certificate had been issued 1 July, 1925," although dated as above, 5 August, 1929. In February, 1932, plaintiff, before 60 years old, became totally and permanently disabled, and furnished proof of same under the certificate and defendant rejected his claim contending that the new insurance certificate was forfeited because plaintiff had not made 36 monthly payments on same since 5 August, 1929. Plaintiff contends that his nonforfeiture value should have been calculated from 1 July, 1925, and the required 36 monthly payments were completed by 1 July, 1928, and that his cash surrender value in September, 1930, was $69.95 (Table A) and that by February, 1932, only $57.13 had been consumed.

The learned judge in the court below held that the nonforfeiture values should be computed from 1 July, 1925, as written in the face of the certificate. We think that this is a reasonable interpretation of the certificate. Any other holding would make this clear language meaningless. Also "the cash loan, paid-up and extended insurance values shall not become available until three years from the date of issue, as set forth on page 1 hereof." A reasonable interpretation would indicate from 1 July, 1925.

This fraternal organization in its settlement it is reasonable to surmise, knowing the heavy monthly increase in plaintiff's premium rate, on exchange of certificates from $1.16 per month to $2.92 per month, taking into consideration everything, made this exception in favor of plaintiff and made the nonforfeiture values to apply as of 1 July, 1925. We see no error in allowing interest from 15 February, 1932, when it is admitted that plaintiff became totally and permanently disabled. For the reasons given, the judgment of the court below is

Affirmed.

IN THE MATTER OF THE BANK OF CLINTON, DR. O. E. UNDERWOOD, ADMINISTRATOR C. T. A. OF JOHN J. CANNADY, DECEASED, AND EDDIE CANNADY, HERMAN CANNADY, TOMMIE CANNADY, LEBBIUS CANNADY, EMMA LEE CANNADY, EFFIE PEARL CANNADY, VONNIE MAY CANNADY, AND ROSA BELLE CANNADY, THE LAST A MINOR, APPEARING HEREBY BY WILLIAM G. KING, NEXT FRIEND, PETITIONERS, *v.* GURNEY P. HOOD, COMMISSIONER OF BANKS, RESPONDENT.

(Filed 1 November, 1933.)

Banks and Banking H e—Plaintiffs held not entitled to preference in insolvent bank's assets under facts of this case.

Where a will appoints a bank which is not authorized to do a trust business, as "agent" to collect notes due the estate, take charge of all personalty and pay the interest therefrom to the testator's wife during her life and at her death to divide the funds equally among the testator's

children, and the bank takes charge of the personalty and commingles the trust funds with its general funds, but issues to itself certificates of deposit for the trust funds, less its commissions, and pays interest to the testator's wife, without objection, until its receivership: *Held*, the trust funds are not a special deposit entitling the testator's children to a preference in the bank's assets in the hands of the statutory receiver. *Bank v. Corporation Commission*, 201 N. C., 381, and *In re Trust Co.*, 204 N. C., 791, cited as controlling.

APPEAL by Commissioner of Banks, from *Grady, J.*, at August Term, 1933, of SAMPSON. Reversed.

The following is the findings of fact and judgment of the court below:

"This cause came on for hearing before the undersigned, resident judge of the Sixth Judicial District, at Clinton, N. C., on 22 August, 1933, all parties being represented by counsel, a jury trial was waived, and it was agreed that the court might find the facts and enter judgment such as, in his opinion, the facts would warrant. The facts are:

1. Prior to 5 October, 1917, the Bank of Clinton was a domestic banking corporation, located at Clinton, N. C., with the usual powers incident to a general banking business; but said bank was not empowered by its charter to act as executor, administrator, guardian or trustee, and maintained no trust department as a part of its banking business.

2. John J. Cannady, a citizen of Sampson County, died prior to 5 October, 1917, leaving a last will and testament, which was admitted to probate and appears in Book of Wills No. 6, at pages 16-21 of Sampson County. The material parts of the said will and the codicil thereto, are as follows:

'Item 2. I devise and bequeath all of my property, real and personal, after paying my just debts and funeral expenses, to my beloved wife, Mary C. Cannady, the same to be held and used by her during her natural life.

Item 3. I give, devise, and bequeath to my beloved children, Eddie Cannady, Herman Cannady, Tommie Cannady, Lebbius Cannady, Emma Lee Cannady, Effie Pearl Cannady, Vonnie May Cannady, and to such other children as may hereafter be born, all of my real estate, and also all of my personal property, which shall not be used or disposed of by my said wife during her lifetime, to take effect after the death of my said wife, and said property both real and personal to be held and owned by all of my above named children, share and share alike, and to the exclusion of all others, and should any of said named children, or after-born child, die before the death of my said wife, and without leaving issue, then the share of such child or children so dying shall be held by said other named children and after-born children.'

A codicil attached to said will, bearing date 28 April, 1915, and duly probated at the same time with the foregoing will, is in the following language:

'Codicil. I, John J. Cannady, being now of sound mind and memory, do make the following codicil to my last will and testament, made by me on 16 August, 1912, as codicil No. 1 to said will:

First: I hereby constitute and appoint the Bank of Clinton, of Clinton, N. C., financial agent of my estate, after my death, for the following specific purposes, to wit, the said bank shall at my death at once take charge of all cash, notes, mortgages, accounts, and other evidences of debt belonging to my estate, and shall proceed to collect said notes, mortgages, accounts, and evidences of debt, and out of the proceeds of said collections and cash pay all debts due by my estate and my funeral expenses and expenses of settling up my estate, and the remainder of said funds said bank shall place at interest during the lifetime of my wife, Mary C. Cannady, and pay her the interest upon said funds, as often as once each year as long as she lives, and at her death, pay said funds to those of my children named and provided for under item three of my will, including my daughter Rosa Belle, born since said will was executed, and any other child or children that I may have born hereafter, and said bank shall not be required to make any bond as such financial agent. Witness my hand and seal, this 28 April, 1915. (Signed) John J. Cannady. (Seal.) Witnesses: Cyrus M. Faircloth, James R. Bass.'

3. No executor was named in said will, and on 5 October, 1917, said Bank of Clinton presented said will and codicil to the clerk of the Superior Court of Sampson County, and caused the same to be probated, and thereupon undertook to execute the provisions of the trust therein and thereby created. The record of the proceedings before the clerk, under which the Bank of Clinton undertook to execute the provisions of the will, was recorded on said 5 October, 1917, in Book of Wills No. 6, page 16, *et seq.*, of the office of the clerk of the Superior Court of Sampson County, and duly indexed.

4. On 12 April, 1919, the said Bank of Clinton filed with the clerk of the Superior Court a paper-writing entitled 'Annual Statement of Account of the Bank of Clinton, Financial Agent, appointed under the will of John J. Cannady, deceased,' which account is recorded in Book of Annual Accounts No. 10, at pp. 120 to 122, inclusive. A copy of said annual account is hereto attached, marked Exhibit A, and made a part of this finding of fact. Said account shows a net principal of cash in hand of $1,365.55, after deducting commissions of 5 per cent and a note executed by C. S. Royal of $500, which note was afterwards collected by the bank.

5. On 12 April, 1919, said Bank of Clinton issued to itself a certificate of deposit in the following words and figures: 'The Bank of Clinton, No. 13127. Not subject to check. Clinton, N. C., 12 April, 1919. There is deposited in this bank $1,365.55 (thirteen hundred sixty-five dollars fifty-five cents), payable to the order of the Bank of Clinton, Financial Agent of Mary C. Cannady, upon return of this certificate properly endorsed. Interest will be allowed hereon at the rate of 4 per cent per annum for whole months if allowed to remain three months or longer. J. A. Stewart, Ass't Cashier.'

On the back of this certificate are memoranda showing payment of interest up to 12 January, 1931. Said memoranda show that the interest was paid periodically from the date of the certificate until 12 January, 1931.

6. On 26 April, 1920, the Bank of Clinton issued to itself another certificate of deposit, No. 14968, for $500.00, representing the collection of the C. S. Royal note, said certificate being in the same form as the one referred to in Finding No. 5. On the back of this certificate there are memoranda showing that interest was paid thereon up to 26 April, 1931. The memoranda on the back of the said certificate show that the interest was paid periodically from the date of the certificate until 26 April, 1931.

7. Said two certificates of deposit represented the net principal in the hands of the said Bank of Clinton from collections made by it, and cash belonging to the estate of John J. Cannady, after deducting commissions of 5 per cent; and the court finds that the said money so collected and held by said bank augmented the assets of said bank to the extent of the aggregate of said two certificates, to wit, $1,865.55.

8. The Bank of Clinton closed its doors on 20 June, 1931, and was immediately taken over by the Commissioner of Banks, who now has the same in charge for the purpose of liquidation; and among the liabilities of the said bank, listed in the 'Report on the Bank of Clinton, Clinton, N. C., as of 20 June, 1931, of Gurney P. Hood, Commissioner of Banks, and filed in the office of the clerk of the Superior Court of Sampson County, as required by law (C. S., 218(c), subsection 9), are the following: '(A) Bank of Clinton, Financial Agent, Mary C. Cannady, $1,365.55, certificate of deposit No. 13127, date issued 4-12-19.' No accrued interest noted. (B) 'Bank of Clinton, Financial Agent, Mary C. Cannady, $500.00, certificate of deposit No. 14968, date issued 4-26-20.' No accrued interest noted.

9. The said sum of $1,865.55 was collected by the said bank as the financial agent of the estate of John J. Cannady, under the provisions of his will and codicil, and the assets of said bank were augmented and increased thereby to the extent of said collections. When said bank

closed its doors in June, 1931, it had on hand in available cash the total sum of $3,176.19, in vault, and $3,811.29 in other banks, all of which passed into the hands of the defendant, Gurney P. Hood, Commissioner of Banks, who held and holds the same, impressed with whatever trust or fiduciary character said moneys had in the hands of the said Bank of Clinton.

10. The Bank of Clinton did not maintain a trust department, and the moneys above referred to, amounting to $1,865.55, were commingled with other moneys, and there is no way to identify the particular moneys received into said bank from the estate of John J. Cannady from the other funds in the hands of said bank; and it did not appear that at any time between the dates when said bank received and collected said money and the closing of said bank did the said bank ever have a less amount of cash than the sum of $1,865.55.

11. The court finds that statutory preferences have been allowed on various items, totaling $12,577.88, against the defendant, Gurney P. Hood, as shown by his books and records.

12. There are not sufficient funds in the hands of said Commissioner of Banks to pay off the unsecured creditors or to meet all of the depository liabilities of said bank in full.

13. The court finds that the certificates of deposit referred to in findings Nos. 5 and 6, and also No. 8, were never delivered to Mary C. Cannady, but were kept at all times by the Bank of Clinton and passed into the hands of the Commissioner of Banks when it closed its doors in June, 1931. The Court also finds that the issuance of said certificates was adopted by the bank as a method of bookkeeping, and for its own convenience.

14. Mary C. Cannady, life tenant under the will and codicil of John J. Cannady, knew that the moneys involved in this proceeding were being held in said bank, and periodically came to said bank and demanded and received interest thereon at 4 per cent per annum, and made no protest as to the manner of the handling of said funds by said bank.

15. Mary C. Cannady died 7 December, 1932, and the parties plaintiff, except Dr. O. E. Underwood and Wm. G. King, are the children of John J. Cannady, and are the only persons beneficially interested in the funds in controversy under the terms of his last will and codicil. No bond was ever filed by the said bank as financial agent for the estate of John J. Cannady, and the plaintiffs are compelled to look solely to the assets of the bank itself for relief, if any relief is to be had.

16. That after the Bank of Clinton closed, O. E. Underwood was appointed administrator *c. t. a.* of John J. Cannady by the clerk of the Superior Court of Sampson County, and as such instituted this pro-

ceeding; but before hearing, and on suggestion of the defendant, the other plaintiffs named in the caption, beneficiaries under the will, were made parties plaintiff, and filed their pleadings; that no other person was appointed or assumed the duties of personal representative of the said estate other than the Bank of Clinton, in the form and manner hereinbefore stated; the court finds that O. E. Underwood, administrator *c. t. a.* of John J. Cannady, has no interest in the controversy.

Upon consideration of the foregoing facts, as found by the court, the court is of the opinion that the Bank of Clinton was a trustee of an express trust, under the will of John J. Cannady; that the moneys received by it from cash and collections were the property at all times of the plaintiffs, subject to the payment of annual interest thereon to Mary C. Cannady, and subject also to commissions of the trustee; that, although said moneys were commingled with other moneys of said bank, the said bank at all times, after receiving and commingling said moneys until the date of its closing, had sufficient cash on hand more than equal to said trust moneys, and said trust moneys went to augment the assets of said bank which came into the hands of the defendant; that the assets which came into the hands of the defendant, Commissioner of Banks, is impressed with the trust in favor of the plaintiffs, beneficiaries under the will of John J. Cannady, to the amount of $1,865.55. It is, thereupon, considered and adjudged that the plaintiffs, beneficiaries, recover of Gurney P. Hood, Commissioner of Banks, out of the assets in his hands as liquidating agent of the Bank of Clinton the sum of $1,865.55, with interest from date of this judgment at 6 per cent, together with the costs of this action, to be taxed by the clerk, which recovery is hereby declared to be preferred and paramount to all the rights of unsecured and unpreferred creditors of the said Bank of Clinton."

The respondent, Commissioner of Banks, excepted and assigned error and appealed to the Supreme Court. The exceptions and assignments of error are as follows: "(1) The respondent assigns as error the ruling of his Honor to the effect that the claim of the petitioners constitutes a preference against the assets of the Bank of Clinton in the hands of the respondent for liquidation and in ordering said claim to be paid before the payment of the unpreferred claims. (2) The respondent assigns as error the signing of the judgment, as appears of record."

Graham & Grady and E. C. Robinson for plaintiffs, petitioners.
J. D. Johnson, Jr., and C. I. Taylor for defendant, respondent.

PER CURIAM: The facts were carefully found by the court below and are set forth above.

The codicil of the will of John J. Cannady provides that after settling the estate "The remainder of said funds said bank shall place at interest during the lifetime of my wife, Mary C. Cannady, and pay her the interest upon said funds as often as once each year as long as she lives. . . . And said bank shall not be required to make any bond as such financial agent."

The bank followed these instructions in good faith and was guilty of no wrong. If the testator in his lifetime had deposited the money in the bank, with instructions to pay the interest on same to his wife for life and the *corpus* to certain of his children, we do not think that this could be distinguished from the other general deposits of a bank when it became insolvent. In fact, as shown in the findings of fact, certificates of deposit were issued for $1,365.55 and $500.00. A notation on the certificates of deposit was as follows: "The Bank of Clinton, financial agent for Mrs. Mary C. Cannady," signed by the assistant cashier, and the interest was paid on same to 12 January, 1931. We think this a general deposit and plaintiffs cannot be allowed a preference. This case is governed by *Bank v. Corporation Com.*, 201 N. C., 381, and *In re Garner Banking & Trust Co.*, 204 N. C., 791. The facts in *Lawrence v. Hood, ante*, 268, are different.

For the reasons given, the judgment of the court below is

Reversed.

GEORGE L. SPELL v. L. C. ARTHUR.

(Filed 1 November, 1933.)

Judgments K b—

The findings of fact by the court below held sufficient upon a liberal interpretation to support the court's order setting aside the judgment for surprise and excusable neglect under C. S., 600.

APPEAL from *Grady, J.*, at March Term, 1933, of PITT. Affirmed.

At May Civil Term, 1932, of Pitt Superior Court, plaintiff obtained a verdict and judgment against the defendant. The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant, through false and fraudulent representation, procure, collect and receive of the plaintiff payments on a house and lot as alleged, with the intent to cheat and defraud the plaintiff of the same? Answer: Yes.

2. In what amount is the defendant indebted to the plaintiff by reason and on account of the said payments? Answer: $550.00, with interest from 1 January, 1930."

On 16 September, 1932, after execution was issued against the property and returned unsatisfied and then against the person of defendant, in accordance with the judgment at May Term, 1932, notice was served on plaintiff and his attorney by defendant that he would move before "his Honor, Clayton Moore, judge of Superior Court, on 26 September, 1932, at 2:30 o'clock p. m., at Greenville, N. C., to set aside and vacate the judgment heretofore signed and entered in this action, upon the grounds set out in the attached motion and affidavit."

The matter came on for hearing before Grady, J., at March Term, 1933, Pitt Superior Court. It was agreed that the judge find the facts and render judgment. The facts were found by the judge and are set forth in the record, and the following order was made: "Ordered and adjudged that the judgment and verdict in this case, which were entered at May Term, 1932, be and the same are hereby set aside, and defendant is permitted to file answer according to his prayer."

The plaintiff excepted and assigned error on the grounds that the court did not find (1) excusable neglect, (2) under the facts found, defendant was guilty of gross negligence and indifference to the process of the court, (3) there was no finding that defendant had a meritorious defense, (4) to the judgment as signed, that on the whole record the court could not set the judgment aside.

S. J. Everett for plaintiff.
Harding & Lee for defendant.

PER CURIAM: The defendant moved to set aside the judgment on the ground of excusable neglect, C. S., 600. From a liberal interpretation of the findings of facts by the court below we think all necessary facts were found upon which in law to base the order of the court below that the verdict and judgment be set aside.

The judgment of the court below is
Affirmed.

STACY, C. J., dissents.

ELLA RASBERRY v. Z. V. WEST.

(Filed 1 November, 1933.)

Bills and Notes F d—Waiver of notice printed in bold-face type in upper left-hand corner of note held binding on parties.

A waiver of notice on a negotiable instrument is generally binding on the parties thereto, and it is generally immaterial where the waiver of notice appears on the instrument, and in this case a waiver of notice and consent to extension of time for payment without notice, printed in bold-face type on the upper left-hand corner of the instrument *is held* a valid waiver of the rights of the sureties upon an extension of time for payment granted the maker without notice.

APPEAL by plaintiff from *Harris, J.*, at May Term, 1933, of LENOIR. No error.

On 4 February, 1927, the plaintiff and the other two makers executed the following note:

"$3,225.00 Kinston, N. C., 4 February, 1927.

On 1 January, 1928, after date, we promise to pay to the order of Z. V. West thirty-two hundred twenty-five and no 100 dollars at Kinston, N. C., with interest from date payable annually at 6 per cent per annum. Value received. This note is secured by deed of trust of even date recorded in county of Lenoir to F. I. Sutton as trustee.

W. O. Rasberry (Seal)
Annie Rasberry (Seal)
Ella Rasberry (Seal)."

The note was written upon a printed form, and across the left-hand edge of the note, at right angles to the printed and written lines of the note hereinabove set out and within the border lines surrounding everything written and printed on the note, is printed in bold-face type the following: "Law Office of Sutton & Greene, Demand, Presentment, Protest and Notice of Protest waived; Consent to extension hereby given without other or further notice."

The plaintiff testified that she signed the note as surety for W. O. Rasberry to the knowledge of the defendant; that she owned a tract of land containing 117.73 acres which, together with land of W. O. Rasberry, was included in a mortgage securing the note; that without her consent the defendant had extended the time of payment for the benefit of W. O. Rasberry, the principal, and that her liability was thereby discharged and the mortgage on her land was released. The nature of the controversy is disclosed by the verdict, which is as follows:

1. Did the plaintiff, Miss Ella Rasberry, execute the note referred to in the complaint as surety of W. O. Rasberry? Answer: Yes.

2. Did the defendant, Z. V. West, know at the time of the execution of the same that Miss Ella Rasberry was signing and executing the same as surety? Answer: Yes.

3. Was the tract of land described in paragraph two of the complaint, containing 117.73 acres, embraced in the deed of trust to F. I. Sutton, trustee, as surety to the payment of $3,225.00 note referred to as having been executed on 4 February, 1927? Answer: Yes.

4. Did the defendant, Z. V. West, have knowledge of the fact that the said land was embraced in said deed of trust as surety to the payment of said note? Answer: Yes.

5. Did the defendant, Z. V. West, for valuable consideration, extend the time of payment of said note on 17 January, 1928, without the knowledge or consent of the plaintiff? Answer: Yes.

6. At the time of the execution of the note and deed of trust by the plaintiff, Ella Rasberry, on 4 February, 1927, was it agreed between her and the defendant, Z. V. West, that her liability was only to the maturity date of said note, the maturity being 1 January, 1928? Answer: No.

7. Is the plaintiff the owner of and entitled to recover of the defendant the tract of land containing 117.73 acres described in paragraph two of the complaint? Answer: No.

Judgment for defendant; appeal by plaintiff.

Rouse & Rouse for plaintiff.
Sutton & Greene for defendant.

PER CURIAM. The appellant presents the single question whether the extension of time alleged to have been given by the defendant to the principal in the note without the knowledge or consent of the plaintiff released her as surety on the note and entitled her to a cancellation of the mortgage on her land. The defendant argues that the question must be given a negative answer for two reasons: (1) The plaintiff is bound by the waiver of notice appearing on the face of the note; (2) the signer of a note, though known to the payee to be a surety, is not discharged under the negotiable instruments law by an extension of time to the principal granted without the knowledge or consent of the surety.

A waiver of notice is generally binding on the party who makes it. *Shaw v. McNeill,* 95 N. C., 535; *Bank v. Johnston,* 169 N. C., 526; *Exchange Co. v. Bonner,* 180 N. C., 20; *Taylor v. Bridger,* 185 N. C., 85.

In her brief the appellant makes no reference to the waiver of notice of an extension of time, but we assume the position to be that as it was written "across the left-hand edge of the note" it is not to be considered a part of the contract. We understand the law to be otherwise. The principle is thus stated in 3 R. C. L., 866, sec. 50: "It is well settled that anything written or printed on a negotiable instrument prior to its issuance relating to the subject-matter of the instrument, and tending to restrain or qualify it, must be regarded as part of the contract intended to be evidenced thereby, and is to be given due weight in its construction. The force of words and memoranda on commercial paper is not to be determined by the part of the instrument upon which they may chance to be written. It cannot be material where the memorandum is found, whether on the front or on the back of the instrument, or above or below the signature." In *Shaw v. McNeill, supra,* it was said that the words "no protest" written on the margin of a draft must have been put there with an object; that is, to dispense with the notice of presentment and refusal to pay, and that otherwise it would be unmeaning. It is generally held that marginal notations placed on a bill or note at the time it is executed, with the intention of making them a part of the contract, must be construed with the body of the instrument and become a substantive part of the bill or note. 8 C. J., 191, sec. 323; Annotation, 13 A. L. R., 251; *Walters v. Rogers,* 198 N. C., 210; *Fitts v. Grocery Co.,* 144 N. C., 463; *Bank v. Couch,* 118 N. C., 436. The plaintiff cannot disregard the express provision of her contract and thereby procure the discharge of her note and the cancellation of her mortgage.

No error.

LUKE LAMB AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HUNT'S 5c-$1 STORES, INC., v. GURNEY P. HOOD, COMMISSIONER.

(Filed 1 November, 1933.)

Banks and Banking H e—Plaintiff held not entitled to preference in assets of insolvent bank under facts of this case.

A depositor drew his draft on his local bank against his general deposit therein, and the payee of the draft immediately forwarded it to the drawee bank, which held it for several days, and upon its later insolvency, mailed the draft back to the payee with a notation of its insolvency. The drawer paid the drawee the amount of the draft and filed a claim for preference with the statutory receiver of the drawee bank. *Held,* the deposit was not impressed with a trust, nor was the claim entitled to a statutory preference, C. S., 218(c) (14), and if the drawee bank's failure to return the draft within twenty-four hours after its receipt by mail implied an acceptance, C. S., 3118, 3119, such acceptance does not *ipso facto* create a preference.

APPEAL by defendant from *Harris, J.,* at March Term, 1933, of SAMPSON. Reversed.

This is an action to have a claim adjudged to be a preference upon the assets of the Bank of Clinton in the hands of the Commissioner of Banks as liquidating agent.

Hunt's Stores, a corporation conducting a branch store in Clinton, was adjudicated a bankrupt on 16 January, 1932, and Luke Lamb was appointed trustee. On 22 June, 1931, the Bank of Clinton was taken over by the Commissioner of Banks, who instituted a proceeding for the settlement of all claims arising out of the insolvency of the bank. On 17 June, 1931, Hunt's Stores, a depositor of the bank, drew its draft on the Bank of Clinton for $500 payable to the order of the Planters and Merchants First National Bank, South Boston, Va., at that time having on deposit a sum in excess of $500.

The Planters and Merchants First National Bank endorsed the draft and mailed it to the Bank of Clinton on 17 June, 1931, for collection and payment, and the draft reached the Bank of Clinton on the next day at about nine o'clock, and was held there without action until after the close of business on 20 June. The draft was then returned unpaid to the Planters and Merchants First National Bank with a letter stating that the Bank of Clinton had suspended business. Thereupon Hunt's Stores paid the draft by permitting it to be charged to its account in said bank (Planters and Merchants) and in apt time filed its claim with the liquidating agent of the Bank of Clinton with request for its allowance as a preferred claim. The request was denied by the liquidating agent, and he tendered certificate or proof of a common claim which was rejected by Hunt's Stores. On appeal the Superior Court allowed the claim as a preference. Exception and appeal by defendant.

J. D. Johnson, Jr., and C. I. Taylor for appellant.
Luke Lamb and Howard H. Hubbard for appellee.

PER CURIAM. We do not perceive that the plaintiff's claim upon any approved theory can be preferred to claims of the general creditors of the bank. Hunt's Stores, Incorporated, made a general deposit of its funds and the bank did not receive them for the particular purpose of paying the draft in question or, indeed, for any other specific purpose. *Corporation Commission v. Trust Co.*, 193 N. C., 696. The deposit, therefore, was not impressed with the quality of a trust, as in *Parker v. Trust Co.*, 202 N. C., 230, and *Flack v. Hood*, 204 N. C., 337. The claim is not entitled to a statutory preference under C. S., 218(c) (14) for the reason that the Bank of Clinton did not charge the draft to the account of the drawer; and if the bank's failure to return the draft within twenty-four hours after its receipt by mail implied an acceptance under the provisions of C. S., 3118 and 3119, such acceptance did not *ipso facto* create a preference. Judgment

Reversed.

J. L. KERR v. NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM.

(Filed 1 November, 1933.)

1. Appeal and Error J c—

The findings of fact by the trial judge upon an appeal from an order of the clerk denying defendant's motion to set aside a judgment under C. S., 600, are not reviewable when supported by competent evidence.

2. **Judgments K b — General counsel's failure to procure attorney to appear in an action is imputable to the client.**

While the neglect of the general counsel of a land bank to prepare and file an answer in an action against the bank may not be imputed to the bank where the attorney is directed to appear and defend the action, where it does not appear that the general counsel was directed to appear in behalf of the bank in the Superior Court or that he undertook to do so, his neglect to procure an attorney to defend the action in the Superior Court is imputable to the bank, the general counsel being regarded as the client's agent in the procurement of an attorney to appear in the action.

APPEAL by defendant from *Grady, J.,* at August Term, 1933, of SAMPSON. Affirmed.

This action was heard by the judge of the Superior Court on defendant's appeal from the order of the clerk, denying defendant's motion that the judgment by default final in the action be set aside for that the neglect of the defendant to file an answer to the complaint was excusable. On the facts found by the judge, and set out in the judgment, the order was affirmed, and the defendant appealed to the Supreme Court.

Butler & Butler for plaintiff.
Bryant & Jones for defendant.

PER CURIAM. The findings of fact set out in the judgment are supported by the evidence offered at the hearing before the judge of the Superior Court. They are, therefore, conclusive, and not reviewable by this Court. *Crye v. Stoltz,* 193 N. C., 802, 138 S. E., 167; *Turner v. Grain Co.,* 190 N. C., 331, 129 S. E., 725; *Gaster v. Thomas,* 188 N. C., 346, 124 S. E., 609. On the finding by the judge that the neglect of the defendant to file an answer to the complaint within the time prescribed by statute, was not excusable, the motion of the defendant was properly denied. The further finding that the defendant had failed to show a meritorious defense to the cause of action alleged in the complaint, while supported by the evidence, is immaterial. C. S., 600.

Conceding that the inexcusable neglect of the general counsel of defendant to prepare and file an answer to the complaint, as he was directed to do by the defendant, should not be imputed to the defendant (*Helderman v. Hartsell Mills Co.,* 192 N. C., 626, 135 S. E., 627), we are of the opinion that the defendant is not free from blame. It does not appear that its general counsel was directed by the defendant to appear in its behalf in the Superior Court of Sampson County, where the action was pending, or that he undertook to enter such appearance. In *Manning v. R. R.,* 122 N. C., 824, 28 S. E., 963, it is said: "Litigation must ordinarily be conducted by means of counsel, and hence, if there is neglect of counsel the client will be held excusable for relying upon the diligence of his counsel, provided he is in no default himself. *Roberts v. Allman,* 106 N. C., 391, *Burke v. Stokely,* 65 N. C., 569. He must, however, not only pay proper attention to the cause himself, but he must employ counsel who ordinarily practices in the court where the case is pending, or who is at least entitled to practice in said court, and engage to go thither. If he employ counsel whose duty is not to attend to the case himself, but merely to select counsel who will do so, the first named counsel is *pro hac vice* an agent merely, his duty not being professional, and his neglect is the neglect of the party himself, and not excusable. *Finlayson v. Accident Co.,* 109 N. C., 196." This principle is applicable to the instant case. The judgment is

Affirmed.

A. R. CONNOR v. J. H. MASON.

(Filed 1 November, 1933.)

Replevin F e—Under admissions in this case judgment for defendant replevying property in sum owed by plaintiff is upheld.

In this case it was determined by the verdict of the jury that replevying defendant was the owner of the property, and it was admitted in the pleadings that the property when paid for by plaintiff was to belong to plaintiff. The verdict established that the value of the property at the time of the seizure was $600 and its present value $300, and that plaintiff was indebted to defendant in the sum of $300. *Held,* a judgment in defendant's favor for $300 to be a lien on the property is, in view of the admission, in substantial compliance with the law.

APPEAL by defendant from *Grady, J.,* at May Term, 1933, of PAMLICO. No error.

F. C. Brinson and Ward & Ward for plaintiff.
Z. V. Rawls and R. E. Whitehurst for defendant.

PER CURIAM. The plaintiff brought suit to recover certain personal property which he caused to be seized under proceedings in claim and delivery. The defendant replevied. The jury found that the plaintiff is not the owner of the property, that its value at the time of seizure was $600, its present value $300, and that the plaintiff is indebted to the defendant in the sum of $300. It was adjudged that the plaintiff recover $600 with interest less $300 to be credited as of the time of trial and that the recovery in favor of the plaintiff, excepting the sum of $50 is a lien upon the property described in the pleadings. The question is whether the verdict supports the judgment. It is recited in the judgment as an admission of the defendant that the property when paid for was to be the plaintiff's. In view of this admission we think the judgment is in substantial compliance with the law.

No error.

DAISY V. KOONCE AND HER HUSBAND, F. P. KOONCE, v. HENRY K. FORT

(Filed 1 November, 1933.)

Appeal and Error J b—

In a suit to foreclose a mortgage an order of the trial court that the bidder at the sale or resales be required to secure his bid before acceptance of the same, is within the sound discretion of the trial court, and is not reviewable.

APPEAL by defendant from *Grady, J.,* at June Term, 1933, of CARTERET. Affirmed.

This is an action to foreclose a mortgage executed by the defendant to secure the payment of his note to the plaintiff, Daisy V. Koonce. See *Koonce v. Fort,* 204 N. C., 426, 168 S. E., 672.

The action was heard on exceptions duly filed by the defendant to the report of the commissioners of the sale made by them under the orders of the court on 1 May, 1933. The exceptions were overruled, and the sale was confirmed.

From judgment directing the commissioners to convey the land described in the complaint to the purchaser at the sale, upon her compliance with her bid, the defendant appealed to the Supreme Court.

Warren & Warren and R. A. Nunn for plaintiff.
Wm. B. Snow for defendant.

PER CURIAM. The exceptions to the orders made in this action directing the commissioners to require the last and highest bidder at the sale or resales of the land described in the complaint, to secure his bid, before their acceptance of the same, were properly overruled. These orders were made by the court in the exercise of its discretion, which is not affected by C. S., 2591. *Koonce v. Fort,* 204 N. C., 426, 168 S. E., 672.

The order confirming the sale, and directing the commissioners to convey the land described in the complaint to the purchaser upon her compliance with her bid, is

Affirmed.

MRS. R. JULIA BALL, EXECUTRIX OF PERCY ST. JOHN LOCKE, v. CITY OF HENDERSONVILLE AND THE BOARD OF FINANCIAL CONTROL OF BUNCOMBE COUNTY.

(Filed 22 November, 1933.)

Pleadings D c—Fact that defendant is governmental agency may not be taken advantage of by demurrer where fact does not appear from complaint.

Where the complaint in an action against a corporation sufficiently alleges a cause of action for damages arising in tort, and it does not appear from the face of the complaint that defendant corporation is a municipal agency created by statute, or that its negligence complained of was committed by it while acting as an administrative or governmental agency of the city, the corporation's demurrer setting forth such facts and maintaining that it was not subject to suit in tort is bad as a speaking demurrer, and should have been overruled.

APPEAL by plaintiff and by the defendant, city of Hendersonville, from *McElroy, J.,* at May-June Term, 1933, of HENDERSON. Reversed.

This is an action to recover of the defendants damages for the death of plaintiff's testator.

It is alleged in the complaint that the death of plaintiff's testator was the result of personal injuries which he suffered on 19 February, 1932, when he slipped and fell while walking down a stairway which extends from a street in the city of Hendersonville, under the sidewalk, to a barber shop in the basement of a building located within the corporate limits of said city; that said stairway was constructed some time during the year 1926 by the then owner of said building, with the permission of the defendant, city of Hendersonville; and that said stairway was negligently constructed, and since its construction has been negligently maintained by the owner of said building, with the permission of said defendant.

It is further alleged in the complaint that since the construction of said stairway, the defendant, the Board of Financial Control of Buncombe County has become the owner of said building, and is now and was at the time plaintiff's testator was injured, the owner of the same; and that said defendant has negligently maintained the said stairway for the use of persons who have occasion to go to the basement of said building for business or other purposes.

It is further alleged in the complaint that the death of plaintiff's testator was caused by the negligence of both the defendants, city of Hendersonville and the Board of Financial Control of Buncombe County, with respect to the construction and maintenance of the stairway on which he was walking at the time he suffered his fatal injuries.

It is further alleged in the complaint that the defendant, city of Hendersonville, is a municipal corporation, and that the defendant, the Board of Financial Control of Buncombe County is a corporation, both organized under and by virtue of the laws of this State.

The plaintiff demands judgment that she recover of the defendants the sum of $25,000, as damages for the death of her testator.

The defendant, city of Hendersonville, in its answer, denies the allegations of the complaint which constitute the cause of action alleged therein against said defendant. It alleges that if the defendants are both liable to the plaintiff on the cause of action alleged in the complaint, the defendant, the Board of Financial Control of Buncombe County is primarily, and said defendant secondarily liable thereon to the plaintiff. The said defendant prays judgment that plaintiff recover nothing of it by her action, but that if it shall be adjudged that plaintiff is entitled to recover of both the defendants, it shall be further adjudged that said defendant recover of its codefendant, the Board of Financial Control of Buncombe County such sum as it shall be required to pay to the plaintiff as damages for the death of her testator, and as the costs of the action.

The defendant, the Board of Financial Control of Buncombe County, in its answer, denies the allegations of the complaint which constitute the cause of action alleged therein against said defendant. As a further answer and defense to the cause of action alleged in the complaint, the said defendant alleges:

"1. That the plaintiff did not present her claim to this answering defendant within the time required by law; that the Board of Financial Control of Buncombe County is a subsidiary of the city of Asheville, a municipal corporation of said Buncombe County and State of North Carolina, and is an agency of the city of Asheville, created, among other things, for the purpose of liquidating collateral securities owned by said city and of holding, for the benefit of said city, title to real estate realized from the foreclosure of said securities; that it is provided, among other things, in the charter of the city of Asheville, that all claims against said city must be presented to the board of commissioners within ninety days from the date said claim accrues, or the claim shall be forever barred.

2. That the plaintiff did not present her claim to the Board of Financial Control and/or the city of Asheville within the time required by law as a prerequisite to her right to maintain this action, on account of which said claim is barred, and this answering defendant specifically pleads the failure of said plaintiff to present her claim within the time required by law as a bar to her recovery herein."

The said defendant, the Board of Financial Control of Buncombe County prays judgment that plaintiff recover nothing by her action.

After the jury was empaneled for the trial of the action on the issue raised by the pleadings, the defendant, the Board of Financial Control of Buncombe County, demurred *ore tenus* to the complaint "on the ground that the complaint fails to state a cause of action, for that said Board of Financial Control of Buncombe County has been created by chapter 235, Public-Local Laws of 1931, to exercise governmental and administrative functions only in the liquidation of property and collateral acquired and owned by said board, and was not, therefore, subject to be sued in tort in handling said property." This demurrer was sustained.

From judgment dismissing the action as against the defendant, the Board of Financial Control of Buncombe County, both the plaintiff and the defendant, city of Hendersonville, appealed to the Supreme Court.

Ewbanks & Weeks and Chas. F. Toms for plaintiff.

J. E. Shipman for defendant, city of Hendersonville.

Reddin & Reddin for defendant, the Board of Financial Control of Buncombe County.

CONNOR, J. The only allegations in the complaint in this action with respect to the demurring defendant, the Board of Financial Control of Buncombe County, are (1) that said defendant is a corporation organized under and by virtue of the laws of this State; (2) that said defendant is now and was at the time plaintiff's testator suffered the injuries which resulted in his death the owner of the building located in the city of Hendersonville, and described in the complaint; and (3) that the negligence of said defendant, as specifically alleged in the complaint, in maintaining the stairway on which plaintiff's testator was walking when he slipped and fell, concurring with the negligence of the defendant, city of Hendersonville, in permitting such maintenance, was a proximate cause of his death.

It does not appear on the face of the complaint that said demurring defendant is a corporation organized under and by virtue of chapter 253 of the Public-Local Laws, 1931, of this State, or that said defendant owns the building described in the complaint and maintains the stairway on which plaintiff's testator was walking when he suffered his fatal injuries, only as an administrative or governmental agency of the city of Asheville, a municipal corporation. These facts are alleged in the answer, and also in the demurrer *ore tenus,* which was first interposed by the defendant after the action was called for trial.

In *Sandlin v. Wilmington,* 185 N. C., 257, 116 S. E., 733, it is said: "A demurrer admits the allegations of the preceding pleading and puts to the test the question of their legal sufficiency; it raises an issue or issues of law upon the facts pleaded, but not a question of fact or an issue of fact; and when it invokes the aid of a fact which does not appear in the pleading demurred to, it is denominated a "speaking demurrer," and as such is insufficient. Therefore, we cannot consider the defendant's reference in the demurrer to the Public Laws of 1913 or to the Private Laws of 1907. These matters may be pleaded in the answer by way of defense."

The principle thus clearly stated by *Adams, J.,* in the opinion for the Court in the cited case, is well settled. *Hanks v. Utilities Co.,* 204 N. C., 155, 167 S. E., 560; *Southerland v. Harrell,* 204 N. C., 675, 169 S. E., 423; *Ellis v. Perley,* 200 N. C., 403, 157 S. E., 29. On this principle, the judgment in the instant case is

Reversed.

A. P. FURR v. JOHN TRULL, W. A. BROWN, AND HENRY M. WINECOFF.

(Filed 22 November, 1933.)

1. **Trial F a—Form and sufficiency of issues.**

Where the issues submitted by the trial court to the jury arise upon the pleadings and are sufficient in form to enable the parties to present to the jury all phases of the controversy, and the answers to the issues are sufficient, when taken with the admissions of the parties, to enable the court to proceed to judgment, an exception to the issues will not be sustained on appeal.

2. **Bills and Notes H c—Issues submitted in this action on note held sufficient.**

Where from the admission of the parties in an action on a note the action would be barred by the statute of limitations if it should be determined that defendants were sureties on the note and not comakers, the submission of issues presenting solely whether each was a surety or comaker is sufficient.

3. **Bills and Notes C b—As between original parties it may be shown by parol that parties signed as sureties and not comakers.**

In an action by the payee of a negotiable note under seal, appearing upon its face to have been signed by several makers, it may be shown upon the trial by parol evidence that with the knowledge of the payee before his acceptance only one of them signed as the original obligor, and that the others signed as sureties only, entitling the sureties to their release upon their defense of the statute of limitations. C. S., 441(1).

APPEAL by plaintiff from *Cowper, Special Judge,* at March Special Term, 1933, of CABARRUS. No error.

This action was begun on 13 June, 1932. It is alleged in the complaint that the defendants are indebted to the plaintiff in the sum of two hundred and thirty dollars, with interest from 1 March, 1927, for money loaned by plaintiff to the defendants, as evidenced by their promissory note, which is in words and figures as follows:

"$230.00. Concord, N. C., 1 March, 1927.

On demand after date for value received, I, we, or either of us, promise to pay to the order of A. P. Furr, two hundred thirty dollars, negotiable and payable at the Citizens Bank and Trust Company, Concord, N. C., with interest at the rate of six per cent per annum from maturity until paid, and the sureties and endorsers hereby waive protest, notice of protest and notice of nonpayment hereof, and guarantee the payment of this note at maturity or any time thereafter, and consent that the time of payment may be extended without notice thereof, and agree to remain bound for its payment until paid in full.

John Trull. (Seal.)
W. A. Brown. (Seal.)
Henry M. Winecoff. (Seal.)

Witness: Geo. W. Prather."

The plaintiff demanded judgment that he recover of the defendants, and each of them, the sum of two hundred and thirty dollars, with interest from 1 March, 1927, and the costs of the action.

No answer was filed by the defendant, John Trull. The defendants, W. A. Brown and Henry M. Winecoff, in their answer, admit the execution by them of the note sued on; they deny that they or either of them is indebted to the plaintiff, as alleged in the complaint. They allege that each of said defendants signed the said note as a surety for the defendant, John Trull, and that at the time the said note was delivered to him, the plaintiff knew that they had so signed the said note. The said defendants plead the three-year statute of limitations in bar of plaintiff's recovery in this action and prayed judgment that plaintiff recover nothing of them, and that they go without day, and recover their costs.

At the trial, the answering defendants admitted the execution of the note offered in evidence by the plaintiff, and testified that they signed the said note as sureties of the defendant, John Trull, and that plaintiff knew at the time the said note was delivered to him that they and each of them had so signed the said note. The plaintiff offered evidence in contradiction of the testimony of the said defendants.

The issues submitted to the jury were answered as follows:

"1. Did the plaintiff, A. P. Furr, know before he received the note sued on and loaned the money, that W. A. Brown was a surety? Answer: Yes.

2. Did the plaintiff, A. P. Furr, know before he received the note sued on, and loaned the money, that Henry M. Winecoff was a surety? Answer: Yes."

From judgment that plaintiff recover of the defendant, John Trull, who failed to file an answer to the complaint, the sum of two hundred and thirty dollars, with interest from 1 March, 1927, and the costs of the action, and that plaintiff recover nothing of the defendants, W. A. Brown and Henry M. Winecoff, the plaintiff appealed to the Supreme Court.

H. S. Williams and E. T. Bost, Jr., for plaintiff.
Hartsell & Hartsell for defendants.

CONNOR, J. The issues submitted to the jury at the trial of this action arise upon the pleadings; they were sufficient in form to enable the parties to present to the jury their respective contentions both as to the law and as to the facts involved in the controversy between the parties out of which the action arose; and are sufficient, when considered in connection with the admissions of the parties in the pleadings and at the trial, to support the judgment. It has been held by this Court that where the issues submitted by the trial court to the jury arise upon the pleadings, are sufficient in form to enable the parties to the action to present to the jury all phases of the controversy between them, and when answered by the jury are sufficient to support a judgment, there is no ground for exception to the issues. *Bank v. Bank,* 197 N. C., 526, 150 S. E., 34, *Bailey v. Hassell,* 184 N. C., 450, 115 S. E., 166, *Potato Co. v. Jeanette,* 174 N. C., 236, 93 S. E., 795, *Power Co. v. Power Co.,* 171 N. C., 248, 88 S. E., 349, *McAdoo v. R. R.,* 105 N. C., 140, 11 S. E., 316. The exceptions to the issues submitted by the trial court to the jury in the instant case, over the objections of the plaintiff, and to the refusal of the court to submit the issue tendered by the plaintiff, cannot be sustained.

There was no error in the instructions of the court to the jury with respect to these issues. Assignments of error based on exceptions to these instructions are not sustained. The contentions of the parties both as to the law and as to the facts involved in these issues were fully and fairly submitted by the court to the jury, and the judgment in this action must be affirmed, unless, as contended by the plaintiff in this Court, there was error in overruling his objections to parol evidence offered by the defendants in support of their contention that each of them signed the note sued on as a surety for the defendant, John Trull, and that plaintiff knew, when he received the said note and loaned the money, that the defendants had so signed the note.

In *Welfare v. Thompson,* 83 N. C., 276, it is said by *Ashe, J.,* that the authorities are very uncertain and conflicting upon the question whether or not it may be shown by parol that a joint promisor or obligor was in fact a surety. "Some of the authorities hold that in law it cannot be done, but is a defense available in equity, and the proof is admissible whenever equitable pleas are allowed in courts of law, and especially in our system, where the distinctions between actions at law and suits in equity are abolished." It is held in that case that parol evidence is admissible to show that a party to a note, although on its face a comaker or coöbligor, is in fact a surety, and that when such fact is known to the payee or holder at the time he accepts the note, the party is liable only as a surety. This principle is now well settled as the law of this State. *Barnes v. Crawford,* 201 N. C., 434, 160 S. E., 464, and cases cited in the opinion in that case. There was no error in the admission of parol evidence at the trial of this action tending to sustain the contentions of the defendants. On the facts admitted in the pleadings, the action is barred as against the answering defendants, although they signed the note under seal. C. S., 437, C. S., 441(1). *Barnes v. Crawford, supra.* These defendants were liable to the plaintiff as sureties, and not as guarantors. The words in the note by which the parties guarantee its payment do not affect their liability, as principal and sureties, respectively. *Rouse v. Wooten,* 140 N. C., 557, 53 S. E., 430. The judgment is affirmed.

No error.

ASHLYN L. CANNON v. A. J. MAXWELL, COMMISSIONER OF REVENUE, AND JOHN P. STEDMAN, STATE TREASURER.

(Filed 22 November, 1933.)

1. **Taxation E d—Where refund is ordered upon demand and notice without action, taxpayer is not entitled to interest on the refund.**

   Where the Commissioner of Revenue, with the approval of the Attorney-General, orders a refund of taxes paid under protest in accordance with C. S., 7979(a), merely upon demand and notice of the taxpayer, no suit having been brought to recover the taxes, the taxpayer is not entitled to interest on the amount refunded and a demurrer to the complaint in an independent action to recover interest thereon is properly sustained. The distinction between C. S., 7979(a), and C. S., 7880(194), which allows interest where the refund is recovered by judgment, is pointed out.

2. Statutes B a—

The settled administrative practice as established by uniform and long-continued interpretation of statutes by the administering State officials, while not controlling, is entitled to due consideration in the construction of the statutes.

3. Interest B a: States E d—

The State never pays interest unless it expressly engages to do so.

APPEAL by plaintiff from *Cranmer, J.*, at May Term, 1933, of WAKE.

Civil action to recover interest on tax refund.

The complaint alleges:

1. That J. Ross Cannon, a resident of South Carolina, died testate, 8 September, 1929, owning stock in North Carolina corporations, which he bequeathed to the plaintiff.

2. That on 16 August, 1930, the plaintiff paid, under protest, to the Commissioner of Revenue of North Carolina the sum of $8,972.56 as a transfer tax or inheritance tax upon said corporate stocks, and duly filed demand and notice for refund.

3. That on 17 February, 1932, the Commissioner of Revenue of North Carolina, upon the advice of the Attorney-General, refunded to the plaintiff the sum of $8,972.56, the amount paid as a transfer tax or inheritance tax on the stock in question, but declined to pay interest on said sum, amounting to $768.65, from the time plaintiff paid said tax under protest, and duly filed demand and notice of refund.

Demurrer interposed by the defendant upon the ground that the complaint does not state facts sufficient to constitute a cause of action, which was sustained, and from which ruling the plaintiff appeals, assigning error.

William H. Beckerdite for plaintiff.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for defendants.

STACY, C. J. Is the plaintiff entitled to interest on her tax refund? The answer is, No.

At the time of the levy of the tax in question, 8 September, 1929, its imposition by the State was thought to be legal, and was legal, under the decision in *Blackstone v. Miller,* 188 U. S., 189, 47 L. Ed., 439. But with the overruling of this decision, 6 January, 1930, in *Farmer's Loan & Trust Co. v. Minnesota,* 280 U. S., 204, foreshadowed in *Frick v. Pennsylvania,* 268 U. S., 473, and followed by *Baldwin v. Missouri,* 281 U. S., 586, and *First Nat. Bank v. Maine,* 284 U. S., 312, in which it was announced that a state could not impose an inheritance tax upon the transfer of shares of stock in domestic corporations owned by a nonresident at the time of his death—such shares of stock not having a business situs in the taxing state—the Commissioner of Revenue, with the approval of the Attorney-General, as is provided by C. S., 7979(a), refunded to the plaintiff the amount of tax paid by her on the transfer of said stock.

It is contended by the plaintiff that under C. S., 7880(194), she is entitled to interest on said refund.

The difference between the two statutes is this: When a refund is ordered, simply upon demand and notice by the taxpayer, no interest is allowed, but when the demand for a refund is denied, and the taxpayer is required to bring suit, and recovers, it is provided that "judgment shall be rendered therefor, with interest." This is a reasonable difference between the two statutes. The policy of the State is thus fixed and determined in regard to the matter, and such is the settled administrative practice as established by the uniform and long-continued interpretation of these statutes. "Numerous authorities agree particularly that contemporaneous construction and official usage for a long period by persons charged with the administration of the law have always been regarded as legitimate and valuable aids in ascertaining the meaning of a statute"—*Walker, J.,* in *Gill v. Comrs,* 160 N. C., 176, 76 S. E., 203, 43 L. R. A. (N. S.), 293. While not controlling, such construction is always entitled to due consideration. 25 R. C. L., 1043.

As far back as *Attorney-General v. Navigation Co.,* 37 N. C., 444, *Ruffin, C. J.,* delivering the opinion of the Court, declared the law of this jurisdiction to be accordant with the general rule, "that the State never pays interest unless she expressly engages to do so." And the law, as thus declared, was upheld by the Supreme Court of the United States in *U. S. v. North Carolina,* 136 U. S., 211. Indeed, such is the prevailing rule, the suggestion of the annotator in 57 A. L. R., 357 (which really has reference to contested rather than uncontested refunds), to the contrary notwithstanding, and upon which plaintiff relies. 15 R. C. L., 17; 59 C. J., 297; Note, 31 Ann. Cas., 316. In this respect, the courts are not at liberty to override the policy of the State as fixed by the law-making body. *Bunn v. Maxwell, Comr. of Revenue,* 199 N. C., 557, 155 S. E., 250. It was held in *Stewart v. Barnes,* 153 U. S., 456, that in the absence of an express statutory provision with respect to interest, a taxpayer could not maintain an independent action for interest alone after he had received and accepted a refund of the amount of the overpayment of the tax itself. Compare *Girard Trust Co. v. U. S.,* 270 U. S., 163 (reversed on other grounds in 271 U. S., 348). The demurrer was properly sustained.

Affirmed.

CLARENCE B. RIDOUT, DECEASED, AND MR. AND MRS. C. G. RIDOUT, FATHER AND MOTHER, AS NEXT OF KIN OF DECEASED, AND WILLIAM DEMENT, DECEASED, AND MRS. MYRTLE DEMENT, MOTHER AND NEXT OF KIN OF DECEASED, v. ROSE'S 5-10-25c STORES, EMPLOYER, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, CARRIER.

(Filed 22 November, 1933.)

1. **Master and Servant F b—**

An injury compensable under the Workmen's Compensation Act is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. N. C. Code, 8081(2) (f).

2. **Same—**

Whether an accident arose out of and in the course of claimant's employment is a mixed question of law and fact.

3. **Master and Servant F i—**

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence.

4. **Master and Servant F b—Evidence in this case held sufficient to sustain finding that accident did not arise out of employment.**

The deceased employees were the manager and assistant manager of defendant's store. On Sunday they made a trip in a car belonging to one of them from the town in which the store was located to another town in which defendant owned a warehouse. While there one of them went to see his fiancée. Before returning they placed certain merchandise from the warehouse in the car to transport it back to the store. Neither employee was required to work on Sunday or to make the trip as a part of his employment. Upon conflicting evidence the Industrial Commission found that they were engaged in an adventure primarily for personal and social reasons and that the receipt of the goods was incidental to the trip and not in the performance of any express or implied duty connected with the employment: *Held*, the findings of fact support the award of the Industrial Commission denying compensation, there being no causal relation between the employment and the accident.

APPEAL by plaintiffs from *Moore, Special Judge,* at January Term, 1933, of WAKE. Affirmed.

These actions, consolidated by consent, are founded upon claims for death filed for the plaintiffs before the North Carolina Industrial Commission.

Clarence B. Ridout and William Dement were employees of Rose's 5-10-25c Stores—the former manager, the latter assistant manager of the store at Morehead City. On Sunday, 20 December, 1931, these young men made a trip from Morehead City to Henderson in a car owned by William Dement. Rose's Stores had a warehouse in Henderson, from which all its branch stores were supplied. After their arrival at Henderson Ridout had dinner with the manager of the warehouse and Dement called to see a young lady. In the afternoon Ridout and the manager walked to the warehouse, got certain goods, put them in the car, and the young men started on their return trip. Near Raleigh the car in which they were traveling was struck by another going in the opposite direction and both young men were killed.

After taking and considering the evidence in reference to the respective claims Matt H. Allen, chairman of the Industrial Commission, made a formal award denying compensation. Among other facts he found the following: Ridout had formerly lived in Henderson and had worked with the defendant company in its warehouse. Dement was to be married to a young lady residing in Henderson, whom he had visited each week-end for several months prior to the Sunday before the accident. On Sunday, 20 December, Ridout obtained from the warehouse articles of merchandise, which were put in the car. Both young men were employed and paid by the week and neither of them was charged with any duties or responsibilities in connection with the work between the time the store was closed on Saturday night and the time it was opened on Monday morning, and neither of them was under the supervision or control of the company during this period. The employer did not require the use of an automobile by the employees in the performance of their duties and did not provide for them either a car or gasoline for this or any other trip.

The award includes the following specific findings:

"1. C. B. Ridout, deceased, manager of the defendant company's store at Morehead City, N. C., and W. D. Dement, deceased, assistant manager of the defendant company's store at Morehead City, left Morehead City on Sunday morning, 20 December, at 3:30 o'clock, for Henderson, N. C., primarily for personal social reasons and not by force of any duty of employment expressed or implied.

2. While in Henderson, N. C., on Sunday, 20 December, they procured from the warehouse of the defendant articles of merchandise valued at $65.00, which they intended to use in the store of the defendant in Morehead City, N. C.

3. The procuring of the goods was incidental to the trip.

4. The accident and injury resulting in the death of Ridout and Dement did not arise out of or in the course of their employment.

5. At the time of the accident and death the goods procured from the warehouse in Henderson, N. C., were in the automobile which belonged to Dement."

The claimants appealed from the award of the commissioner to the full Commission who affirmed the award, and from the full Commission to the Superior Court in which the award was again affirmed. The claimants excepted and appealed.

J. M. Broughton and W. H. Yarborough, Jr., for appellants.
Thomas A. Banks for appellees.

ADAMS, J. The Workmen's Compensation Law defines "injury" and "personal injury" as injury by accident arising out of and in the course of the employment—the words "out of" referring to the origin or cause of the accident and the words "in the course of" to the time, place and circumstances under which the accident occurred. Compensation Law, sec. 2(f); *Conrad v. Foundry Co.,* 198 N. C., 723. Whether the accident complained of arose out of and in the course of the employment is a mixed question of law and fact (*Harden v. Furniture Co.,* 199 N. C., 733); but the facts as found by the Commission, when supported by competent evidence, are "conclusive and binding" on the appellate courts. Compensation Law, sec. 60; *Bryson v. Lumber Co.,* 204 N. C., 664; *Johnson v. Bagging Co.,* 203 N. C., 579; *Wimbish v. Detective Co.,* 202 N. C., 800.

The Industrial Commission found from the conflicting evidence that the death of the employees occurred while they were engaged in an adventure primarily for personal and social reasons and not in the performance of any duty expressly or impliedly connected with their employment, and that their receipt of the goods was incidental to the trip. It is obvious that from Saturday night until Monday morning the relation of employer and employee was suspended, and that there was no causal relation between the employment and the accident. *Canter v. Board of Education,* 201 N. C., 836; *Dependents of Phifer v. Dairy,* 200 N. C., 65. It follows that the death of the employees did not arise out of and in the course of their employment. Judgment

Affirmed.

BEN BARRIER v. THOMAS AND HOWARD COMPANY.

(Filed 22 November, 1933.)

1. **Automobiles C e—Whether parking of car on highway at night without lights is proximate cause of injury is ordinarily question for jury.**

The parking of a truck on a public highway at night without lights in violation of C. S., 2621(77), 2621(94), is negligence *per se,* and where the evidence is conflicting as to whether such improper parking proximately caused plaintiff's injuries, resulting from a collision between the truck and the car in which he was riding as a guest, the question of proximate cause is for the determination of the jury upon an appropriate issue.

2. Master and Servant A a—In emergency in this case employee held authorized to hire driver for defendant's truck.

The evidence tended to show that one of defendant's trucks broke down on a highway, and that the driver, being unable to communicate with defendant, telephoned the proprietor of a garage in which another of defendant's trucks was stored to send the truck by a certain person not formerly employed by defendant, that the driver sent by the garage proprietor, while rendering the aid asked for by defendant's driver, parked defendant's truck upon the highway at night without lights in violation of statute, and that such improper parking proximately caused the injury in suit: *Held,* in the emergency defendant's employee had authority to employ the second driver, and defendant was liable for the negligent acts of such driver though defendant had not directly employed such driver, and defendant's employee ordinarily had not authority, express or implied, to employ a driver for defendant.

APPEAL by defendant from *Hill, Special Judge,* at June Term, 1933, of CABARRUS. No error.

This is an action to recover of the defendant damages for personal injuries suffered by the plaintiff, when the automobile in which he was riding as the guest of its owner and driver, collided with a truck which is owned by the defendant and was parked on a highway in this State, in the night time, without a light on its rear, by its driver, who was the servant and employee of the defendant when he parked the said truck.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,500."

From judgment that plaintiff recover of the defendant the sum of $3,500, and the costs of the action, the defendant appealed to the Supreme Court.

Hartsell & Hartsell for plaintiff.
Armfield, Sherrin & Barnhardt for defendant.

CONNOR, J. The only question presented by this appeal is whether there was error in the refusal of the trial court to allow defendants' motion for judgment as of nonsuit, at the close of all the evidence. C. S., 567. The defendant contends:

1. That, conceding that the evidence offered by the plaintiff tended to show that its truck was parked on the highway, in the night time, without a light on its rear, in violation of C. S., 2621(77) and C. S., 2621(94), as alleged by the plaintiff, all the evidence showed that such negligence on the part of the driver of the truck was not the proximate

cause of plaintiff's injuries, but that the sole proximate cause of said injuries was the negligence of the driver of the automobile in which plaintiff was riding at the time of the collision; and,

2. That, conceding that the evidence offered by the plaintiff tended to show that the driver of the truck was negligent, and that his negligence was a proximate cause of plaintiff's injuries, as alleged by the plaintiff, all the evidence showed that the driver of the truck was not the servant or employee of the defendant, but that he was the servant or employee of another, at the time he parked the truck on the highway.

Neither of these contentions can be sustained. Conceding without deciding that the driver of the automobile in which plaintiff was riding as a guest, was negligent in the operation of his automobile, as contended by the defendant, the evidence as to whether such negligence was the sole proximate cause of plaintiff's injuries, was at least conflicting. For this reason, the evidence pertinent to this phase of the case, was properly submitted to the jury. *Godfrey v. Coach Co.*, 201 N. C., 264, 159 S. E., 412. In that case it is said that where the violation of a statute, intended and designed to prevent injury to person or property, which is negligence *per se*, is admitted or established by the evidence, it is ordinarily a question for the jury to determine whether such negligence is a proximate cause of injury which resulted in damages. This principle, which is well established as the law, is applicable in the instant case.

There was no evidence at the trial of this action which tended to show that the driver of the truck with which the automobile in which the plaintiff was riding at the time he was injured, was a servant or employee of the defendant, prior to the time he was directed by the proprietor of the garage in the city of Charlotte to take the truck, which was then in said garage, and drive it to the place where the collision occurred. There was evidence, however, which showed that an employee of defendant who was driving one of its trucks on the highway from the city of Concord to the city of Charlotte, and whose truck had broken down on the highway about 8 or 9 miles north of the city of Charlotte, had requested the proprietor of the garage to send the truck to his aid, and that this request was made over the telephone, after the said employee had failed to get into communication with the defendant at Charlotte. All the evidence showed that this employee was at the time of the request confronted with an emergency which made it necessary for him to get aid, and that for this reason he requested the proprietor of the garage, at which the truck was stored, to send him the truck by the driver who parked the truck on the highway. Although this employee had no express authority, and under ordinary circumstances, no implied authority to employ a driver of defendant's truck, and thereby establish the relationship of master and servant, or employer and employeé between the defendant and said driver, in view of the emergency which confronted him, at the time, it is well settled that he had such authority; all the evidence showed that he exercised this authority because of the emergency. This principle was recognized by this Court and applied in *Perkins v. Coal Co.,* 189 N. C., 602, 127 S. E., 677.

We are of the opinion that there was no error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence, and that the judgment should be affirmed.

No error.

ANNIE BARHAM v. H. G. PERRY.

(Filed 22 November, 1933.)

1. **Courts B b—Pleadings in action brought in court of limited jurisdiction must show that action is within court's jurisdiction.**

In an action brought in a court of limited jurisdiction plaintiff must make it appear in the pleadings that the action is within the jurisdiction of the court, and where he fails to do so a demurrer to the jurisdiction should be sustained even upon motion made after judgment upon appeal to the Superior Court, the defect not being remedial by verdict.

2. **Courts A c—**

Upon appeal from a recorder's court the jurisdiction of the Superior Court is derivative, and where it is not made to appear in the pleadings that the recorder's court had jurisdiction, the Superior Court obtains no jurisdiction.

3. **Pleadings I c—Time within which motion to dismiss must be made.**

A motion to dismiss an action on the ground that one tenant in common may not sue another for possession is properly denied when the motion is not made until after judgment and the question has not been raised by movant prior thereto, but a motion to dismiss on the ground that the action is not within the jurisdiction of the court may be made at any time.

4. **Judgments F b—Judgment in this case held uncertain and incapable of execution.**

A judgment in an action to recover certain personal property that plaintiff should recover one of two mules, without designating which, and one-half of the other property, consisting of one wagon and harness, one rake and one mower, is uncertain and incapable of execution, and defendant's objection thereto should be sustained.

APPEAL by defendant from *Cranmer, J.,* at Second March Term, 1933, of WAKE.

Civil action with ancillary remedy of claim and delivery to recover possession of "two mouse-colored mules; one 2-horse wagon and harness;

one mower and one rake," instituted in the recorder's court of Zebulon and Little River Township, and tried *de novo* on appeal to the Superior Court of Wake County.

The complaint alleges that plaintiff is the sole owner of the property described in the complaint, but on trial in the Superior Court, evidence was offered tending to show that plaintiff and her son, R. I. Barham, acquired the property in question under her husband's will, and that they owned the same as tenants in common.

The value of the property is not alleged in the complaint, nor is the affidavit in claim and delivery set out in the record. It is recited that the defendant replevied and retained possession of the property, but the forthcoming bond does not appear, and the amount of it is not stated.

The defendant claims sole ownership in himself and offered evidence tending to show that he purchased said property from plaintiff's son, R. I. Barham.

The jury returned the following verdict:

"1. Is the plaintiff the owner of and entitled to the possession of the property described in the complaint? Answer: Yes.

"2. What was the value of the property described in the complaint at time it was seized by the sheriff? Answer: $115.00. (Mules $150.00; wagon and harness $40.00; rake and mower $40.00—total $230.00. One-half $115.00.)"

Judgment on the verdict that plaintiff recover of the defendant "one of the mules described in the complaint and one-half of the other personal property."

The defendant objected to the judgment and moved to dismiss the action for want of jurisdiction, and because one tenant in common of personal property cannot maintain an action against a cotenant for the possession of said property. Overruled; exception.

The defendant then objected to the judgment on the ground that it is indefinite, uncertain and incapable of execution. Overruled; exception.

Defendant appeals, assigning errors.

J. G. Mills for plaintiff.
Gulley & Gulley for defendant.

STACY, C. J. The recorder's court of Zebulon and Little River Township, Wake County, is a court of limited jurisdiction, both as to territory and subject-matter. Chap. 409, Public-Local Laws, 1915. In civil actions, its jurisdiction is confined to cases wherein the sum demanded does not exceed five hundred dollars on contract or two hundred fifty dollars in tort, with the right of appeal, as from a court of the justice of peace, to the Superior Court of Wake County. Sec. 29.

It was said in *Alexander v. Bateman,* 1 N. C., 248, that "Whatever is claimed to be within the jurisdiction of an inferior court ought to be plainly shewn, as in pleading, nothing shall be intended within its jurisdiction unless it be expressly alleged." And it is a rule of general observance that the total omission of an *ad damnum* clause in a complaint is fatally defective as against a demurrer or motion to dismiss for want of jurisdiction, when the action is brought in a court of limited jurisdiction. Nor is the deficiency cured by the verdict. 7 R. C. L., 1056. There was no motion to amend the complaint in this respect, which might have been allowed, if seasonably made. Note, 21 A. S. R., 621.

The jurisdiction of the Superior Court on appeal is derivative only (*Ijames v. McClamroch,* 92 N. C., 362), hence it would appear that the motion to dismiss for want of jurisdiction should have been allowed.

But as the motion was not made until after judgment, it was properly denied on the second ground alleged, to wit, that one tenant in common of chattels cannot sue another for conversion of said chattels. While this is the general rule, there are exceptions to the rule as well established as the rule itself, *e. g.,* in case of imminent destruction or loss of the property. *Thompson v. Silverthorne,* 142 N. C., 12, 54 S. E., 782; *Shearin v. Riggsbee,* 97 N. C., 216, 1 S. E., 770; *Grim v. Wicker,* 80 N. C., 343; *Powell v. Hill,* 64 N. C., 169; *Doyle v. Bush,* 171 N. C., 10, 86 S. E., 165; *Waller v. Bowling,* 108 N. C., 290, 12 S. E., 990; 12 L. R. A., 261, and note. And after judgment, the question not having been raised before, it would seem that, if permissible, as it is on the present record, the case should be ruled in favor of jurisdiction as upon one of the exceptions.

The objection to the judgment that it is uncertain and incapable of execution appears to be well taken. *Carter v. Elmore,* 119 N. C., 296, 26 S. E., 35. It is adjudged that plaintiff recover of defendant one of two mules without designating which one. It is further provided that she recover one-half of the other personal property described in the complaint without stipulating which half. Counsel for plaintiff assured us on the argument that he thought the parties could readily agree on a division of the property; that his client would be willing to take the wagon and give the defendant the mower and the rake and one of the mules or his choice of the mules. But on the day of division the defendant might say to the plaintiff: "You never said wagon to me a time." Then, what would the sheriff or the executioner do? In this dilemma, the position of plaintiff and defendant would be close akin to that of the two fabled hunters, who were unable to agree upon a division of the quarry of the day's hunt, which consisted of a turkey, an opossum and a rabbit. "You take the possum and give me the turkey and the rabbit, or I'll take the turkey and give you the possum and the rabbit," said the one. "You never said turkey to me a time," was the reply of the other.

The judgment was doubtless drawn by counsel and submitted for the court's signature, as is customary on the circuit.

Reversed.

IN RE WILL OF SALLIE D. WILDER.

(Filed 22 November, 1933.)

1. **Appeal and Error J e—**

   Exceptions to the exclusion of testimony will not be considered on appeal where it is not apparent of record what the answers of the witness would have been if he had been allowed to testify.

2. **Appeal and Error J d—**

   The burden is on appellant to make error plainly appear, as the presumption is against him.

3. **Trial E e—**

   An exception to the refusal of the trial court to give requested instructions will not be sustained where it appears that the instructions requested were substantially given in language equally explicit and clear.

APPEAL by caveator from *Schenck, J.*, at March Special Term, 1933, of MECKLENBURG.

Issue of *devisavit vel non,* raised by a caveat to the will of Sallie D. Wilder, late of Mecklenburg County, based upon alleged mental incapacity and undue influence.

From a verdict and judgment upholding the paper-writing propounded as the last will and testament of the deceased, the caveator appeals, assigning errors.

George W. Wilson and Claude B. Woltz for caveator.
Stewart & Bobbitt for propounder.

STACY, C. J. Two errors are assigned, one based upon the exclusion of evidence and the other upon the court's refusal to give an instruction as prayed.

The record does not show what the answers to the interrogatories propounded to the witness would have been, hence we cannot say the exclusion of the evidence was hurtful or erroneous. Where the record shows exceptions to unanswered questions, without more, the exceptions will not be considered on appeal. *Miller v. Bottling Co.,* 204 N. C., 608, 169 S. E., 194. We cannot assume that the answers would have been favorable to the caveator. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175.

The burden is on appellant to show error, and he must make it appear plainly, as the presumption is against him. *Frazier v. R. R.,* 202 N. C., 11, 161 S. E., 689; *Poindexter v. R. R.,* 201 N. C., 833, 160 S. E., 767; *In re Ross,* 182 N. C., 477, 109 S. E., 365.

The instruction requested, while not given in the exact language of the prayer, was substantially given by the court in language equally as explicit and clear. This was a sufficient compliance with the caveator's request. *Michaux v. Rubber Co.,* 190 N. C., 617, 130 S. E., 306; McIntosh Prac. & Proc., 636.

"The judge is not required to give an instruction in the very words used by counsel in the request for it, even if the instruction be a proper one. If he gives it substantially, and does not, by any change of language, weaken its force, it is a sufficient compliance with the law"—*Walker, J.,* in *Graves v. Jackson,* 150 N. C., 383, 64 S. E., 128. See, also, to like effect, *Shaw v. Pub. Service Corp.,* 168 N. C., 611, 84 S. E., 1010.

A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the decisions on the subject, and that the verdict and judgment should be upheld.

No error.

GERTRUDE BURROUGHS ET AL. v. ELIJAH WOMBLE.

(Filed 22 November, 1933.)

1. **Pleadings D e—**

   Upon demurrer a complaint will be construed most favorably to plaintiff, and the demurrer will be overruled if, in any view, the complaint states a cause of action.

2. **Partition B b; Husband and Wife B d—Deed to husband and wife solely to effect partition to husband does not create estate by entireties.**

   Where tenants in common in lands agree to a division thereof, and in order to effect a partition, execute deeds to each other for their respective shares, the fact that the deed to one of them is executed to him and his wife does not create an estate by the entireties in the husband and wife, but operates merely as a partition of the land and conveys no additional estate, and where the wife survives the husband, an action by her heirs to recover possession of the land from the husband's heirs,

in which no equitable element is involved or presented, a demurrer to the complaint setting forth such deed to the husband and wife is properly sustained.

3. Ejectment C a—

Where in an action to recover possession of land plaintiffs set out in their complaint the deed under which they claim, they are bound by its contents.

APPEAL by plaintiffs from *Harris, J.*, at Chambers, 14 October, 1933. From WAKE.

The court sustained the defendant's demurrer to the complaint and the plaintiffs appealed. Affirmed.

J. M. Broughton and W. H. Yarborough, Jr., for appellants.
Jones & Brassfield for appellee.

ADAMS, J. It is axiomatic that the complaint must be construed most favorably in behalf of the plaintiffs and that if it states a cause of action in any view the demurrer must be overruled. The plaintiffs allege that they are the only heirs at law of Emeline Richardson, who died intestate; that they are the owners in fee and are entitled to possession of the land described in the complaint; and that the defendant wrongfully withholds the possession. If these were the only allegations it would be necessary to overrule the demurrer; but the plaintiffs assert their title by making the deed under which they claim a part of the complaint and are bound by its contents. Their title is founded upon the contention that Gray H. Harris and his wife conveyed the land in controversy to S. R. Richardson and Emeline Richardson, his wife, under whom the plaintiffs claim; that the grantees acquired an estate by entirety; that upon the death of S. R. Richardson the title vested in the surviving wife; and that upon her death the plaintiffs succeeded to her estate. The deed was executed by Harris and his wife pursuant to the following recital: "Whereas the said S. R. Richardson and Gray H. Harris are the owners as tenants in common of a tract of land purchased by them from G. B. Alford and wife, Texanna Alford, the 29th day of March, 1909, by deed recorded in Book 237 at page 278 in the office of the register of deeds of Wake County, and whereas the said S. R. Richardson and Gray H. Harris are desirous of dividing and deeding to each other one-half in value of the said land, so that each may hold his part in severalty, and whereas the said S. R. Richardson and Gray H. Harris have had the said land surveyed and have agreed upon a division of the same, and whereas the said S. R. Richardson and Gray H. Harris have mutually agreed to execute deeds to each other for their respective portion of said land which they held as tenants in common."

A conveyance of real property to a husband and his wife ordinarily creates an estate by entirety and upon the death of one the whole belongs to the other by right of survivorship. *Simonton v. Cornelius,* 98 N. C., 433. In the present case this principle has no application. According to the preamble in the deed the conveyance from Harris and his wife to Richardson and his wife operated merely as a partition of the land owned by Harris and Richardson as tenants in common and did not convey any additional estate. Emeline Richardson therefore acquired no independent interest by the conveyance; the interest which was already her husband's was simply assigned to him by metes and bounds. *Harrison v. Ray,* 108 N. C., 215; *Harrington v. Rawls,* 136 N. C., 65; *Jones v. Myatt,* 153 N. C., 225; *Speas v. Woodhouse,* 162 N. C., 66; *Valentine v. Granite Corp.,* 193 N. C., 578.

This is an action at law in which no equitable element is involved or presented for consideration. Judgment

Affirmed.

STATE v. B. R. EVANS.

(Filed 22 November, 1933.)

1. **Municipal Corporations H e—Ordinance held to impose tax on operator of gasoline pump and to subject him to penalty therein provided.**

Where a section of a city ordinance prescribes a tax "upon every gasoline pump or tank located upon any sidewalk," and another section of the ordinance prescribes a penalty for its violation, the tax is required of the operator or owner of such pumps, and is not merely a charge against the pumps themselves, and failure to pay the tax prescribed subjects the owner or operator of such pumps to the penalty.

2. **Criminal Law I k—**

Where the jury returns a special verdict on a statement of facts assented to by defendant, there is no reason to demand a general verdict on the same aspect of the case.

3. **Municipal Corporations K a—Revenue Act held not to prohibit city from levying tax on gasoline pumps in nature of police permit.**

The provision of the Revenue Act, Public Laws of 1931, chap. 427, sec. 153, prescribing that no county, city or town should levy a license tax on the business of selling gasoline at retail in excess of one-fourth of the State license tax does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1933, of WAKE. No error.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

William B. Oliver and W. I. Rowland for defendant.

ADAMS, J. Disregarding ambiguities we find from the record that the defendant was prosecuted in the city court on a warrant charging him with failure to pay a license tax for the privilege of operating gasoline pumps located on a sidewalk of the city of Raleigh. The defendant excepted to the court's denial of his motion to dismiss the action.

It is first contended that the ordinance applies only to persons owning the business or following the trade, occupation, or profession therein enumerated, and that section 11, subsection 3, purports to levy the tax, not upon a person, but upon the pumps, and that the warrant therefore sets out no offense. By the terms of subsection 3 a tax of $15.00 is laid "upon every gasoline pump or tank located upon any sidewalk." and according to section 2 any person committing a breach of the ordinance shall be subject to a penalty of $50.00 or imprisonment for 30 days, or both, in the discretion of the court.

The gravamen of the offense for which the defendant was prosecuted is the operation of the pumps without a license, and the tax imposed was manifestly required of the owner or operator of the pumps and was not intended to be a charge upon the pumps themselves. The authority of the city to enact ordinances of this character is not in controversy.

The jury returned a special verdict upon a statement of facts to which the defendant assented and by which the location of the pumps was determined. There was, therefore, no reason for demanding a general verdict on this question.

We now advert to the defendant's principal contention. The Revenue Act provides that every person, firm, or corporation engaged in the business of . . . retail selling or delivering of any motor fuels or lubricants . . . shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax of $50.00 in cities having a population of 30,000 or more, and that counties, cities, and towns may levy a license tax on each place of business located therein not in excess of one-fourth of that levied by the State. Public Laws, 1931, chap. 427, sec. 153. For the operation of a service station in the city of Raleigh the defendant paid $12.50, which is one-fourth of the State tax, and he takes the position that as against him the tax of $15.00 imposed by virtue of subsection 3 is not enforceable. His position in this respect cannot be maintained. The tax authorized by section 153 of the Revenue Act is imposed upon a business enterprise; that which is imposed by subsection 3 is in the nature of a permit granted as a police regulation for the operation of gasoline pumps located on Fayetteville Street "between the curb-line of the street and the property line." The tax upon the business referred to is prescribed by the State; the permit is issued by the city in the exercise of its power of regulation. Municipal ordinances involving the exercise of this power in various phases have frequently been sustained. As the power is not denied the citation of authorities on this point is not necessary.

No error.

JAMES J. COLEMAN v. A. H. VANN ET AL.

(Filed 22 November, 1933.)

1. **Judgments K f: Wills F i—Judgment against executor may not be attacked collaterally by him or by devisees in absence of allegations of fraud.**

   An executor may not collaterally attack a judgment rendered against him in his representative capacity by setting up matters concluded in the judgment in the creditor's subsequent action in the nature of a creditor's bill, nor may the devisees of the testator collaterally attack the judgment in such action in the absence of allegations of fraud and collusion.

2. **Pleadings I a—**

   Where defendants' answer alleges matters in defense which had been determined and precluded by a judgment against them or their privy, a motion to strike out such allegations is properly allowed.

APPEAL by defendants from *Cranmer, J.*, at Chambers, in the town of Louisburg, N. C., on 23 May, 1933. Affirmed.

This is an action in the nature of a creditor's bill to compel the defendants, executors of S. C. Vann, deceased, to sell the lands of their testator, which were devised by his last will and testament, to their codefendants, to make assets for the payment of a judgment recovered by the plaintiff of said executors in the Superior Court of Franklin County, for the sum of $2,500, with interest and costs.

The action was heard on the motion of the plaintiff that certain paragraphs of the answer filed by the defendants to the complaint be stricken therefrom, on the ground that the allegations in said paragraph do not constitute defenses to the action, but are sham, irrelevant and frivolous pleading.

The motion was allowed, and the defendants appealed from the order striking the said paragraphs from the answer.

Simms & Simms and W. L. Lumpkin for plaintiff.
G. M. Beam and J. H. Bridgers for defendants.

CONNOR, J. The defenses set up in the paragraphs of the answer, which have been stricken therefrom, are not available to the defendants in this action.

The judgment recovered by the plaintiff against the defendants, executors of S. C. Vann, deceased, is conclusive upon them, and cannot be attacked by them collaterally, in this action. The executors are precluded by the judgment as to all matters alleged in said paragraphs as defenses to this action.

In the absence of allegations in their answer to the effect that the judgment was recovered by the plaintiff of the executors of S. C. Vann, deceased, by fraud and collusion between them, the defendants, devisees of the said S. C. Vann, deceased, are also bound by the judgment. The said devisees cannot in this action avail themselves as against the plaintiff, of the defenses set up in said paragraphs, without alleging that the judgment was procured by reason of fraudulent collusion between the plaintiff and the executors. For obvious reasons, the answer contains no such allegations. The motion of the defendants first made in this Court that they be allowed to amend their answer is denied. The proposed amendments, if allowed, would not avail the defendants in this respect.

In *Best v. Best,* 161 N. C., 513, 77 S. E., 762, it is said: "It is now very generally understood that on a petition to sell land for assets, the heirs, in protection of the real estate, may plead the statute of limitations whenever such plea would be available to the executor or administrator in protection of the personalty; but, when the claim is evidenced by a subsisting judgment against the executor or administrator, the heir is concluded as to its validity, unless the judgment can be successfully assailed on the ground of fraud and collusion, or collusive fraud, as expressed in some of the cases."

In *McNair v. Cooper,* 174 N. C., 566, 94 S. E., 98, it is said to be well settled in this State that the heirs at law may attack any claim allowed by an administrator, even if reduced to judgment, if it can be shown that the judgment was rendered through fraud and collusion between the plaintiff and the administrator. This principle is applicable in the instant case. The order is

Affirmed.

M. F. TEETER AND WIFE, LOU A. TEETER, v. MARVIN F. TEETER.

(Filed 22 November, 1933.)

1. **Mortgages H b—Where serious dispute exists as to amount of debt and agreement not to foreclose, restraining order should be continued.**

   Suit was brought by a tenant in common in lands to restrain the foreclosure of a mortgage given his cotenant for money borrowed. Plaintiff alleged that defendant had agreed not to foreclose the mortgage during the current year in consideration of plaintiff's renting defendant's interest in the lands and that plaintiff had breached his contract by advertising the property and that certain credits had not been allowed on the mortgage debt as agreed upon by the parties, and prayed for an accounting: *Held,* the temporary restraining order entered in the cause should have been continued to the hearing, it appearing that serious dispute existed between the parties.

2. **Appeal and Error J a—**

   On appeal in injunction proceedings the Supreme Court has the power to find and review findings of fact.

CIVIL ACTION, before *Warlick, J.,* at April Term, 1933, of CABARRUS.

The plaintiff, Lou A. Teeter, and the defendant are tenants in common in a tract of land upon which there is a house occupied by plaintiffs. On or about 9 May, 1925, the plaintiffs executed a deed of trust covering their one-half interest in the land to secure a note of $1,100, which said note had been purchased and is now owned by the defendant. The plaintiff alleges that in May, 1925, he sold the defendant a mule, and that the defendant agreed to credit the purchase price amounting to $90.00 on said note. The plaintiffs further allege that in January, 1933, they rented from the defendant, his one-half of the house on the land for the sum of $5.00 per month for the entire year of 1933, and further contracted to pay to the defendant the sum of $5.00 per month to be credited on said note, and that in consideration of such agreement the defendant agreed not to foreclose his deed of trust on the property during the year 1933. The plaintiffs further allege that the defendant in breach of said agreement has advertised the land for sale under the deed of trust aforesaid, and that the defendant had failed to make certain credits upon said note. Whereupon the plaintiffs ask that there be an accounting between the parties and that the sale be restrained. A temporary restraining order was signed, and at the hearing affidavits were offered by the parties, and thereupon the court dissolved the restraining order and the plaintiffs appealed.

Hartsell & Hartsell for plaintiffs.
H. S. Williams for defendant.

BROGDEN, J. Do the pleadings and affidavits disclose a serious dispute between the parties?

The plaintiff alleged that he had leased the defendant's half interest in the dwelling-house for the year 1933 for a stipulated monthly rental, and in consideration thereof the defendant had agreed not to foreclose the deed of trust during the year 1933. It was alleged also that the defendant had violated the agreement by advertising the property. There was allegation to the effect that certain credits had not been allowed to the plaintiffs by the defendant upon said indebtedness.

This Court has held that it has the power to find and review findings of fact on appeal in injunction proceedings, and that "where it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the parties until the hearing . . . ; where serious questions were raised . . . ; or where reasonably necessary to protect plaintiff's rights." *Wentz v. Land Co.,* 193 N. C., 32, 135 S. E., 480; *Ferebee v. Thomason, ante,* 263. The defendant relies upon *Leak v. Armfield,* 187 N. C., 625, 122 S. E., 393. But it must be noted that in the *Leak case, supra,* there was no allegation of fraud, mistake, or breach of contract, and that the amount involved was due and ascertained. Consequently, the case is not controlling.

Manifestly a serious dispute had arisen between the parties and the restraining order should have been continued to the hearing.

Reversed.

A. E. STEWART v. BANKS CRAVEN.

(Filed 22 November, 1933.)

Appeal and Error A d—

No appeal lies from the refusal of the Superior Court to set aside a writ of *recordari* granted in the cause.

APPEAL by plaintiff from *Cranmer, J.,* at Chambers, 18 April, 1933. From WAKE. Appeal dismissed.

H. L. Swain for plaintiff.
J. A. Thebault for defendant.

CLARKSON, J. Upon petition of defendant *in due form,* the court below issued a writ of *recordari,* as a substitute for an appeal, to the justice of the peace who tried the action. No exception was entered to the granting of this writ. The order appealed from to this Court is as follows:

"This cause coming on to be heard on this 18 April, 1933, in chambers before his Honor, Judge E. H. Cranmer, one of the judges holding court for the Seventh Judicial District of North Carolina at Raleigh, North Carolina, and being heard upon motion filed by plaintiff for the purpose of setting aside a writ of *recordari* granted in this cause on ..... March, 1933, and being heard upon said petition and motion filed therein; the court finds the following facts:

1. That at 4:00 p.m., on 17 December, 1933, a judgment was rendered against the defendant without having had an opportunity to present his defense, that the defendant appeared for trial at 4:15 p.m., that a justice of the peace therein presiding did not allow the defendant to be heard, because he was too late, in spite of the fact that all of the said defendant's witnesses were present, that he did not reopen the case.

2. That the court further finds as a fact that the defendant is an ignorant Negro, that he is not guilty of laches and that he made his motion for a writ of *recordari* within the time allowed by law and has a meritorious defense.

It is therefore, on motion of J. A. Thebault, attorney for the defendant, considered, ordered and adjudged and decreed that the plaintiff's motion to set aside the writ of *recordari* granted in this cause, be, and the same is hereby denied and dismissed. That the defendant go hence without day and recover his costs."

The *recordari* was therefore granted and this appeal is made by plaintiff from a motion to set aside the writ of *recordari.*

It was held in *Perry v. Whitaker,* 77 N. C., 102: No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of *recordari.* At p. 104, it is said: "Whether a writ of *recordari* ought to have been issued depends upon the facts." *Barnes v. Easton,* 98 N. C., 116.

In *Merrell v. McHone,* 126 N. C., 528 (529), we find: "At the first term of the Superior Court, an affidavit and petition for *recordari* were filed, and an order for the *recordari* issued. Not being obeyed, an alias issued, and on its return the plaintiff moved to dismiss, which was refused. No appeal lay from such refusal (*Perry v. Whitaker,* 77 N. C., 102), and it was properly entered as an exception. The final judgment being against the plaintiff, it now comes up for review. Had the final judgment been in favor of the plaintiff, the exception would then have become immaterial, and an appeal unnecessary." *Hunter v. R. R.,* 161 N. C., 503; *Bargain House v. Jefferson,* 180 N. C., 32; See N. C. Code of 1931 (Michie), section 630, and cases cited.

From the record the action is in the Superior Court for trial *de novo.* We observe the motion was made at Chambers, but no point seems to be made of this.

Appeal dismissed.

J. P. TEMPLE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 22 November, 1933.)

1. **Pleadings F a: Appeal and Error J b—**

The court has the discretionary power to allow an application for a bill of particulars, C. S., 534, or to grant a motion to require a pleading to be made more definite and certain, C. S., 537, or to strike out in his discretion orders previously made under the statutes, and no appeal will lie from such discretionary orders.

2. **Courts A f—**

The doctrine of *res judicata* does not apply to ordinary motions incidental to the progress of a trial, and the court has the discretionary power to strike out an order made at a prior term requiring plaintiff to make his complaint more definite and certain or file a bill of particulars.

3. **Pleadings F a: Appeal and Error J b—**

The fact that a defendant might have proceeded under C. S., 900-901 for an examination of the adverse party does not render the granting of his motion to require plaintiff to make his complaint more definite and certain or file a bill of particulars improvident as a matter of law, and the trial court's action in striking out such order on the ground that it was improvidently entered is reviewable and will be held for error.

APPEAL by defendant from *Cranmer, J.,* at Second June Term, 1933, of WAKE.

Civil action to recover damages for failure of defendant to transmit and deposit funds to credit of plaintiff in Wachovia Bank and Trust Company, as per alleged agreement, which caused a number of plaintiff's checks to be refused for payment by said bank.

After the defendant had obtained an extension of time within which to file answer, it lodged a motion to require the plaintiff to make his complaint more definite and specific by setting out the dates, amounts and payees of checks alleged to have been dishonored, etc., or to furnish the defendant a bill of particulars containing the desired information. This motion was allowed at the April Term, 1933.

Thereafter, at the June Term, the same judge presiding, upon motion of plaintiff, the order entered at the April Term was stricken out "as having been improvidently granted," and because "defendant has full and complete remedy under the provisions of C. S., 900-901, which have reference to examination of adverse parties and witnesses for the purpose of obtaining information upon which to file pleadings."

From this second ruling, the defendant appeals, assigning error.

W. T. Shaw and Ruark & Ruark for plaintiff.
J. C. Little for defendant.

STACY, C. J. It is the uniform holding that an application for bill of particulars under C. S., 534, or a motion to require a pleading to be made more definite and certain under C. S., 537, is addressed to the sound discretion of the trial court, and his ruling thereon is not reviewable on appeal, except perhaps in case of manifest abuse of discretion. *Carteret County v. Construction Corp.,* 199 N. C., 485, 154 S. E., 746; *Gruber v. Ewbanks,* 199 N. C., 335, 154 S. E., 318; *Power Co. v. Elizabeth City,* 188 N. C., 278, 124 S. E., 611.

The law is stated in 49 C. J., 625, as follows:

"It is a matter for the sound discretion of the court whether under the circumstances of the case a demand for a bill of particulars should be granted or refused. This power of the court exists by virtue of its general power to regulate the conduct of trials, and it is incident to its general authority in the administration of justice. It is the same power in kind that courts have to grant a new trial on the ground of surprise."

It is likewise settled by the decisions that the principle of *res judicata* does not extend to ordinary motions incidental to the progress of a cause, but only to those involving substantial rights. *Revis v. Ramsey,* 202 N. C., 815, 164 S. E., 358; *Townsend v. Williams,* 117 N. C., 330, 23 S. E., 461; *Allison v. Whittier,* 101 N. C., 490, 8 S. E., 338; *Mabry v. Henry,* 83 N. C., 298.

Therefore, it may be conceded that at the June Term the court was at liberty, in its discretion, to strike out the discretionary order previously granted at the April Term. *Townsend v. Williams, supra.* But the second ruling, the one revoking the prior order, was not made in the court's discretion. It is stated that the first order is stricken out because improvidently granted, and for the further reason that defendant has an adequate remedy under C. S., 900-901 to compel the plaintiff to submit to examination, etc. It is true, the defendant might have resorted to the suggested procedure and examined the plaintiff under the statutes mentioned, but this would not render the order previously granted under C. S., 534 or 537, improvident as a matter of law.

Error.

STATE v. JOHN LEWIS EDWARDS.

(Filed 22 November, 1933.)

1. Criminal Law L d—

Where no entries of appeal appear in the record or in the clerk's certificate the Supreme Court acquires no jurisdiction.

2. Criminal Law L a—

Where an appeal in a capital case is not prosecuted as required by the Rules of Court the motion of the Attorney-General to docket and dismiss the appeal must be allowed, no error appearing on the face of the record proper.

MOTION by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

STACY, C. J. At the May Criminal Term, 1933, Mecklenburg Superior Court, the appellant herein, John Lewis Edwards, and another, were tried upon an indictment charging them with the murder of one J. W. Brown, which resulted in a conviction and sentence of death of appellant, and an acquittal and discharge of his codefendant.

From the judgment of death entered against the defendant, John Lewis Edwards, it is suggested that he gave notice of appeal to the Supreme Court, though no entries of appeal appear thereon or in the clerk's certificate.

It was said in *Spence v. Tapscott,* 92 N. C., 576 (as stated in the first head-note, which accurately digests the opinion): "In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment."

To like effect is the decision in *Walton v. McKesson,* 101 N. C., 428, 7 S. E., 566.

But conceding notice of appeal was properly given and inadvertently omitted from the record or the clerk's certificate, it appears that the prisoner has made no effort to prosecute his appeal as required by the rules governing such procedure, and that the motion of the Attorney-General, to docket and dismiss, must be allowed. *S. v. Rector,* 203 N. C., 9, 164 S. E., 339; *S. v. Massey,* 199 N. C., 601, 155 S. E., 255; *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728; *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881.

The appeal should have been ready for argument, 8 November, 1933, at the call of the docket from the Fourteenth District, the district to which the case belongs. Rule 7, Rules of Practice, 200 N. C., 818; *Carroll v. Mfg. Co.,* 180 N. C., 660, 104 S. E., 528.

Nothing entitling the prisoner to a new trial appears on the face of the record or in the clerk's certificate. *S. v. Edney,* 202 N. C., 706, 164 S. E., 23.

Appeal dismissed.

J. C. SPRINGS ET AL. v. THE ATLANTIC REFINING COMPANY.

(Filed 22 November, 1933.)

1. **Landlord and Tenant D b—**

Where a lessee parts with his entire interest in the leased premises to another the transaction is an assignment of the lease and not a subletting.

2. **Same—**

Where an assignment of a lease is made with the knowledge and consent of the lessor, the assignee takes under the original lease and has the same rights in regard to the removal of fixtures as his assignor.

3. **Fixtures B a; Injunctions D b—**

In an action by a lessor to restrain the lessee's assignee from removing improvements, the allegations in the assignee's answer that it was the owner of the property in dispute and had the right of removal, ordinarily entitles the assignee to show such right if it can.

4. **Landlord and Tenant C b—**

During the continuance of the relationship of landlord and tenant under a lease contract the tenant will not be allowed to dispute the landlord's title either by setting up an adverse claim or by showing title in a third person.

5. **Same—**

The principle that a tenant is estopped to deny his landlord's title does not apply where the tenant's claim of title to fixtures placed upon the premises and the right to remove same is based upon the provisions of the lease contract between the parties.

6. **Fixtures B a—**

The right of a tenant to remove trade fixtures upon the expiration of the lease between the parties is governed by a more liberal rule than the one determining the right of a mortgagor or vendor to fixtures and improvements upon land.

7. **Fixtures B c—**

The trend of our decisions is to the effect that a tenant does not lose his right to remove trade fixtures by failing to remove them before the expiration of the term of the original lease between the parties where a renewal lease is executed by the parties, although the renewal lease contains no reservation of the right of removal, especially if the lessee can show the intention of the parties to allow such removal upon the expiration of the second lease.

8. **Fixtures B b: Injunctions D b—Held: order restraining removal of fixtures should not have been made permanent, but continued to hearing.**

The owner leased certain land as a filling station site, the lessee being authorized to build a filling station thereon, and the lease providing that the lessee should have the right to remove filling station and fixtures upon the expiration of the term of the lease. The lessee constructed the filling station and subsequently assigned the lease and sold the filling station to defendant, and at the expiration of the term of the lease the lessor executed a renewal lease to the assignee, containing like provision for removal of the building and fixtures but no reservation of the right to remove fixtures placed on the land during the life of the first lease. At the expiration of the term of the second lease the lessor obtained a temporary order restraining the lessee in the second lease, the assignee of the first lease, from removing the building and fixtures. The defendant filed answer setting up title to the filling station and fixtures, and asserting the right to remove them as trade fixtures. Upon the return of the temporary restraining order it was made permanent: *Held,* the temporary order should have been continued to the hearing, and the order of the court making it permanent without a hearing was error.

9. **Fixtures B b—**

What constitutes a "trade fixture" removable by the tenant upon the expiration of the term of his lease, either as a matter of right or by special agreement, is to be determined by the facts of the particular case.

10. **Injunctions D b—**

Where upon the return of a temporary restraining order the pleadings and evidence raise serious issues of fact, which, if established, would entitle plaintiff to the permanent injunction demanded, the temporary order will ordinarily be continued to the hearing.

APPEAL by defendant from *Harding, J.,* at July Term, 1933, of MECKLENBURG.

Civil action to restrain the defendant from removing "any buildings, structures, equipment and appliances placed or installed upon the premises of the plaintiffs at the northeast corner of West Trade and Pine streets in the city of Charlotte prior to the first day of July, 1932."

The facts alleged are these:

1. On 17 June, 1929, the plaintiffs leased the premises in question to John F. Boyd and C. E. B. Mendenhall as a filling-station site for a period of three years beginning 1 July, 1929, and ending 30 June, 1932. Said lease which is in writing and duly registered contains the following stipulation:

"Lessors hereby agree that the lessees may erect on said property such buildings, structures, or equipment as they may desire for carrying on their business and the lessees shall have the right to remove said buildings from said property at the termination of this lease."

2. On 27 July, 1929, Boyd and Mendenhall assigned their lease to the Red "C" Oil Company, a wholly owned subsidiary of the Atlantic Refining Company. These two companies were later merged and were in continuous possession of said premises up to 30 June, 1933. At the time of the merger the lease was again assigned to the present defendant.

3. On 21 August, 1929, Boyd and Mendenhall, by "Bill of Sale," sold and delivered to the Red "C" Oil Company, its successors and assigns, for a consideration of $4,500, "the building, cement driveway and cement wash-pit," which they had erected on plaintiffs' premises in accordance with the terms of the original lease, with the same right of removal as assignors had, etc.

4. On 22 June, 1932, the plaintiffs leased to the defendant, Atlantic Refining Company, already in possession under the prior assigned lease, the premises in question for a period of one year, beginning 1 July, 1932, and ending 30 June, 1933. Said lease, which is in writing and duly registered, also contains a stipulation with respect to removing buildings, structures, equipment and appliances placed thereon by the lessee for filling station purposes, "at the termination of this lease, and for a period of ten days thereafter."

5. It is alleged by the defendant that the assignment of the Boyd and Mendenhall lease to the Red "C" Oil Company, "was made with the knowledge and express consent of the plaintiffs," and that the said buildings and other improvements placed thereon by Boyd and Mendenhall are now "the sole and exclusive property of the defendant and it has the right to remove the same from said premises."

6. It is further alleged by plaintiffs that the defendant is attempting to remove the buildings and improvements erected on said premises by Boyd and Mendenhall.

Wherefore, plaintiffs pray that defendant be permanently enjoined from removing said buildings and improvements. The temporary restraining order was made permanent on the return hearing, and from the order, thus entered, the defendant appeals, assigning errors.

J. C. Newell and H. L. Taylor for plaintiffs.
Edgar W. Pharr for defendant.

STACY, C. J. It is alleged in the complaint that Boyd and Mendenhall sublet the premises in question to the Red "C" Oil Company, but as they parted with their entire interest in the demised premises, what really took place was an assignment or sale of the lease. *Millinery Co. v. Little-Long Co.,* 197 N. C., 168, 148 S. E., 26. And as this was done with the knowledge and express consent of the plaintiffs, it would seem that the assignees were in under the original lease with the same rights which their assignors had with respect to removing buildings and improvements placed thereon by Boyd and Mendenhall. *Causey v. Orton,* 171 N. C., 375, 88 S. E., 513.

It is further alleged in the answer that the buildings and other improvements erected or placed upon the demised premises by Boyd and Mendenhall are now "the sole and exclusive property of the defendant and it has the right to remove the same from said premises." Under this allegation, it would seem the defendant is entitled to show, if it can, its right to remove the said buildings and improvements. *Belvin v. Paper Co.,* 123 N. C., 138, 31 S. E., 655; *R. R. v. Deal,* 90 N. C., 110.

The injunction was made permanent—not simply continued to the hearing—upon the theory that the defendant, being a tenant in possession, is estopped to deny the plaintiffs' title to the buildings and improvements placed thereon prior to the beginning of defendant's present lease, 1 July, 1932.

It is undoubtedly a well settled principle of law, that where the conventional relation of landlord and tenant exists, and the latter takes possession of the demised premises under a lease from the former, the tenant will not be permitted to dispute the title of the landlord, either by setting up an adverse claim to the property or by undertaking to show that it rightfully belongs to a third person, during the continuance of such tenancy. *Hobby v. Freeman,* 183 N. C., 240, 111 S. E., 1; *Clapp v. Coble,* 21 N. C., 177. But this wholesome and salutary principle, supported both by authorities and considerations of public policy, we apprehend is not necessarily controlling in a case like the present, where the removal of buildings and improvements placed upon the premises by the tenant is expressly provided for in the agreement between the parties. *Causey v. Orton, supra; Freeman v. Leonard,* 99 N. C., 274, 6 S. E., 259; *Feimster v. Johnson,* 64 N. C., 259.

Speaking to the subject in *Insurance Co. v. Totten,* 203 N. C., 431, 166 S. E., 316, it was said: "That a tenant who takes possession of demised premises under a lease from the landlord, or being in possession unconditionally agrees to hold as such (*Riley v. Jordan,* 75 N. C., 180), will not be permitted to dispute the landlord's title, during the continuance of the tenancy, is established by all the authorities on the subject. *Hobby v. Freeman,* 183 N. C., 240, 111 S. E., 1; *Clapp v. Coble,* 21 N. C., 177. But this principle, founded upon reasons of public policy, applies only in cases where the simple relation of landlord and tenant exists (*Abbott v. Cromartie,* 72 N. C., 292), and does not extend to instances where title to the property is brought in question or equities are to be adjusted between the parties. *Hughes v. Mason,* 84 N. C., 473; *Hauser v. Morrison,* 146 N. C., 248; *Turner v. Lowe,* 66 N. C., 413."

The doctrine of fixtures has been the subject of much consideration by the courts. A number of interesting cases appear in our own Reports, and they abound with many niceties and distinctions.

For example, in *Smithwick v. Ellison,* 24 N. C., 326, speaking of the right of a tenant to remove manure made on a farm during the tenancy, it was said: "Whatever things the tenant has a right to remove ought to be removed within the term; for, if the tenant leave the premises without removing them, they then become the property of the reversioner. But where the tenant holds over, even so as to become a trespasser, he will not be considered as having abandoned the things he had a right to remove." Compare 11 R. C. L., 1080.

Likewise, in *Feimster v. Johnson,* 64 N. C., 259, where it was held that a still "set up and encased in masonry in the usual way" did not become a part of the realty, contrary to the intention of the parties, the Court taking occasion to say: "As a general rule, whatever is attached to land is understood to be a part of the realty; but as this depends, to some extent, upon circumstances, the rights involved must always be subject to explanation by evidence. Whether a thing attached to land be a fixture or chattel personal depends upon the agreement of the parties, express or implied. *Naylor v. Collins,* 1 Taunt., 19; *Pervy v. Brown,* 2 Stark., 403; *Wood v. Hewitt,* 55 E. C. L., 913. A building, or other fixture which is ordinarily a part of the realty, is held to be personal property when placed on the land of another by contract or consent of the owner."

Again, in *Sanders v. Ellington,* 77 N. C., 255, holding that a crop cultivated by a tenant and left standing in the field after the expiration of his term becomes the property of the landlord, the Court observed: "A tenant for years may remove fixtures and anything put there by himself, provided he does so before his term expires; but after that, all of such things belong to the owner of the land, and the *quondam* tenant has no right to put his foot upon the land except by license of the owner. All of the cases agree that such is the law." See, also, *Chauncy v. R. R.,* 195 N. C., 415, 142 S. E., 327.

But coming nearer to the subject in hand, it was said in *Horne v. Smith,* 105 N. C., 322, 11 S. E., 373, that as between landlord and tenant, the intent with which fixtures are attached to the freehold becomes material, and if it appear that they were for the better temporary use of the premises, they may be treated as "trade fixtures," and hence removable. *Causey v. Plaid Mills,* 119 N. C., 180, 25 S. E., 863.

The liberality extended a tenant, in favor of trade and to encourage industry, may not apply as between vendor and vendee or mortgagor and mortgagee. *Pritchard v. Steamboat Co.,* 169 N. C., 457, 86 S. E., 171; *Overman v. Sasser,* 107 N. C., 432, 12 S. E., 64; *Foote v. Gooch,* 96 N. C., 265, 1 S. E., 525; *Bond v. Coke,* 71 N. C., 97; *Latham v. Blakely,* 70 N. C., 368. The reason for the rigid enforcement of the rule in the one case and its relaxation in the other is clearly pointed out by *Pearson, C. J.,* in *Moore v. Valentine,* 77 N. C., 188. When fixtures are annexed to the land by the owner, actual or potential, the purpose is to enhance the value of the freehold, and to be permanent. But with the tenant a different purpose is to be served, hence for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what has apparently become affixed to the land, if affixed for the purposes of trade, and not merely for the better enjoyment of the premises. *Pemberton v. King,* 13 N. C., 376; *Basnight v. Small,* 163 N. C., 15, 79 S. E., 269.

Our present consideration is limited to the relative rights of landlord and tenant. See *Overman v. Sasser, supra,* where the subjects are classified and distinguished and the rules applied to the different classes.

It is the position of the plaintiffs that the defendant cannot now avail itself of any right of removal given to Boyd and Mendenhall, for even though at one time the said defendant may have stood in the shoes of Boyd and Mendenhall, as assignee of their lease, having failed to remove said building and improvements at or before the end of the term, or to reserve said right in the new lease, the fixtures thereby passed by operation of law to the plaintiffs as owners of the property. *Precht v. Howard,* 187 N. Y., 136, 79 N. E., 847.

The apparent majority-holding is to the effect that where, at the expiration of a lease during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises containing no reservation of any right or claim of the tenant to the fixtures placed thereon during the life of the first lease, such fixtures are not removable by the tenant during or at the expiration of the second lease, notwithstanding his continuous possession of the premises. 11 R. C. L., 1072; 26 C. J., 708. There is, however, a strong line of authority to the contrary. *Thomas v. Gayle,* 134 Ky., 330, 120 S. W., 290, 20 Ann. Cas., 766, and note. And many courts hold that the execution of a new lease without a reservation of the right of the tenant to remove fixtures placed on the demised premises under a prior lease does not *ipso facto* deprive the tenant of the right of removal at the expiration of the new lease. *Ogden v. Garrison,* 82 Neb., 302, 117 N. W., 714, 17 L. R. A. (N. S.), 1135; *Kerr v. Kingsbury,* 39 Mich., 150, 33 Am. St. Rep., 362; *Radey v. McCurdy,* 209 Pa., 306, 103 Am. St. Rep., 1009, 58 Atl., 558, 67 L. R. A., 359; *Bergh v. Herring-Hall-Marvin Safe Co.,* 136 Fed., 368, 70 L. R. A., 756.

The precise question seems not to have been heretofore presented in this jurisdiction, but the trend of our decisions apparently favors the minority view, or at least the right of the tenant to show the intention of the parties, if contrary to the strict rules of the common law. *Bank v. Cox,* 171 N. C., 76, 87 S. E., 967; *Finance Co. v. Weaver,* 199 N. C., 178, 153 S. E., 861; *Cox v. Lighting Co.,* 151 N. C., 62, 65 S. E., 648; *Feimster v. Johnson, supra.*

Thus, in *R. R. v. Deal,* 90 N. C., 110, we find *Merrimon, J.,* animadverting on the subject as follows:

"It is the policy of the law to encourage trade, manufactures, and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery, and such things, certainly intended and calculated to promote them, are treated, not as part of the land, but distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure. Hence if a house, or other structure, is erected upon land only for the exercise of trade or the mixed purpose of trade and agriculture, no matter how it may be attached to it, it belongs to the tenant, and may be removed by him during his term, and in some classes of cases, after it is ended. . . . There are authorities which decide that the tenant may remove the buildings while he remains in possession of the land, but not after he has yielded possession thereof. These go upon the ground that if the tenant neglect to avail himself of his right within the period of his term, the law presumes that he voluntarily relinquished or abandoned his claim in favor of the landlord, but such presumption cannot arise, where the facts and circumstances, and the nature of the property, and the uses to which it is devoted, combine to rebut such a presumption. If the tenant yields possession and leaves the structure standing, this fact may be evidence that it was not used or intended only for the purpose of trade or manufacture, or of abandonment of it, but it could not change the established character of the property. The character of the structure, its purpose and the circumstances under which it was erected, the understanding and agreement of the parties at the time the erection was made, must all be considered in determining whether it became a part of the freehold or not."

Finally, it may be said that what constitutes a "trade fixture," which is attached to the demised premises by a tenant and removable by him at the end of his term, either as a matter of right, or by special agreement, depends upon the facts of the particular case. 11 R. C. L., 1070-1082-1083. The general principles applicable to the question are well settled, but the courts have experienced much difficulty in applying them to variant fact situations. 11 R. C. L., 1075. "What are fixtures and what are not has become to be a very important question. It is presented in so many ways and under so many different circumstances that it is not always easy to determine what are and what are not such fixtures as to become a part of the realty and pass as a part thereof under a conveyance or a transmission of the real estate"—*Furches, J.*, in *Woodworking Co. v. Southwick,* 119 N. C., 611, 26 S. E., 253.

In the present state of the record, which seems somewhat meager and might have been prepared more in conformity to the rules (*Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602), we think the court erred in doing more than continuing the injunction to the hearing.

Where the main purpose of an action is to obtain a permanent injunction, and the evidence raises serious questions as to the existence of facts, which, if established, would entitle the plaintiff to the relief demanded, the usual practice is to continue the temporary restraining order to the hearing. *Proctor v. Fertilizer Works,* 183 N. C., 153, 110 S. E., 861; *Sutton v. Sutton,* 183 N. C., 128, 110 S. E., 777; *Tise v. Whitaker,* 144 N. C., 508, 57 S. E., 210.

Error and remanded.

GURNEY P. HOOD, COMMISSIONER OF BANKS, v. T. E. HOLDING AND HARVEY HOLDING, ADMINISTRATOR, C. T. A.

(Filed 22 November, 1933.)

1. **Insane Persons I d—Judgment against insane person obtained without service or appearance is void and subject to collateral attack.**

   A judgment against an insane person who has not been adjudged insane is voidable and not void, and cannot be collaterally attacked, and a judgment against an insane person upon a mere semblance of service may be vacated for irregularity, but a judgment against an insane person, obtained without service of process and without appearance in person or by attorney is void and may be attacked collaterally.

2. **Insane Persons I a: Process B c—Method of service on persons adjudged insane.**

   Where a person has been judicially declared insane service of summons in an action against him may be made by delivering a copy of the summons to his committee or guardian and to him personally, or if no committee or guardian has been appointed, service may be made on him personally or returned without service with the statutory endorsement, but in no event can final judgment be rendered against him without adequate notice to his committee or guardian, or to his guardian *ad litem* duly appointed by the court. C. S., 451, 483(3).

3. Banks and Banking H a: Insane Persons I d—Statutory stock assessment against insane person is void in absence of service or appearance.

A statutory stock assessment levied against a stockholder in an insolvent bank who has been adjudicated a lunatic prior to the assessment, N. C. Code, 218(c) (13), such assessment having been made without service on his committee or guardian or upon a guardian *ad litem* appointed by the court, is void, and may be attacked upon his subsequent death, by his administrator by appeal to the Superior Court from such assessment.

APPEAL by plaintiff from *Harris, J.,* at September Term, 1933, of WAKE.

This is a controversy without action upon the following agreed statement of facts:

. . . (3) The Bank of Wake, a banking corporation organized under the laws of the State of North Carolina, having its principal office in Wake County, became insolvent, and Gurney P. Hood, Commissioner of Banks, took possession thereof on or about 18 December, 1931, and filed in the office of the clerk of the court of Wake County, a notice that he had so taken possession thereof as required by Consolidated Statutes, section 218(c).

(4) T. E. Holding, since deceased, was the owner of twenty-one shares of the capital stock of the said bank of a par value of $100 per share, and was the owner thereof at the time the said Gurney P. Hood, Commissioner of Banks, took possession of the said bank.

(5) After the expiration of thirty days from the date he filed notice of his taking possession of the Bank of Wake, the said Gurney P. Hood, Commissioner of Banks, docketed in the office of the clerk of the Superior Court of Wake County, in Judgment Docket 37, at page 180, a stock assessment against T. E. Holding upon his said stock in the Bank of Wake in the sum of $2,100, together with interest and costs. The said stock assessment was docketed on 29 February, 1932, and is the judgment herein appealed from.

(6) On 28 August, 1928, T. E. Holding was duly adjudged a lunatic by the clerk of the Superior Court of Wake County. He was not insane when he purchased the said stock in the Bank of Wake, which purchase was made some years prior to adjudication.

(7) On 20 January, 1933, Harvey Holding was duly appointed and qualified as administrator *cum testamento annexo* of the estate of T. E. Holding, and has served as such administrator from the said date to the present time.

(8) On 18 February, 1933, Gurney P. Hood, Commissioner of Banks, filed with the said Harvey Holding, administrator as aforesaid, his

formal proof of claim against the estate of T. E. Holding for the payment of the said stock assessment.

(9) On 1 September, 1933, Harvey Holding, administrator of the estate of T. E. Holding, as aforesaid, gave notice of appeal to the Superior Court of Wake County from the aforesaid stock assessment, and brought this appeal, no other appeal having been taken from the said judgment prior thereto.

(10) At the time the said stock assessment was docketed as above set forth T. E. Holding had been adjudged insane by the clerk of the Superior Court and was (without) general or testamentary guardian, and no guardian *ad litem* was then or has been since appointed for him in this matter.

Upon the foregoing facts the trial court held that the judgment docketed against T. E. Holding is void and ordered that it be canceled of record. The plaintiff excepted and appealed.

Willis Smith, I Beverly Lake and John H. Anderson, Jr., for appellant.

John G. Mills, Jr., and J. G. Mills for appellee.

ADAMS, J. While of sound mind T. E. Holding purchased twenty-one shares of stock in the Bank of Wake, each of the par value of one hundred dollars. Several years afterwards (on 28 August, 1928) he was duly adjudged a lunatic and was committed to a hospital for the treatment and protection of the insane. The Bank of Wake closed its doors on 18 December, 1931, and on 29 February, 1932, the Commissioner of Banks, having taken charge of the assets, docketed in the office of the clerk of the Superior Court of Wake County a judgment in the sum of $2,100 as an assessment on the twenty-one shares of stock. T. E. Holding died 7 October, 1932, and on 20 January, 1933, Harvey Holding qualified as administrator of his estate with the will annexed. Proof of the claim was filed with the administrator on 18 February, 1933, and was disapproved. The administrator's right to contest the claim is not denied.

In the absence of statute an insane person who is not subject to the protection of a general or testamentary guardian may sue and be sued, although it is generally required that in such event he be represented at the hearing by a next friend or a guardian. *Smith v. Smith,* 106 N. C., 498; *Abbott v. Hancock,* 123 N. C., 99. Indeed, our statute provides that if a defendant in an action or special proceeding is *non compos mentis* he must defend by his general or testamentary guardian if he has one within the State, and if he has none, by a guardian *ad litem* to be appointed by the court. C. S., 451.

When the stock assessment was docketed in the Superior Court T. E. Holding was insane and was not represented by a guardian general or testamentary, or by one appointed *lite pendente.* In what respect and to what extent was he affected, if at all, by the judgment?

The banking law stipulates that at the expiration of a specified period the Commissioner of Banks may levy an assessment equal to the stock liability of each stockholder in the bank and shall file a copy of the levy in the office of the clerk of the Superior Court which, after being recorded and indexed, shall have the force and effect of a judgment of the Superior Court and shall be immediately due and payable. If the judgment is not paid the Commissioner of Banks may have an execution issued against the delinquent stockholder; but the stockholder may appeal to the Superior Court from the levy of the assessment and may have the issue raised by the appeal determined. Thereupon, the trial judge may in his discretion grant relief upon such terms as he may fix. All sums collected under the levy shall become available as general assets of the bank, and the amount remaining after liquidation shall be applied pro rata to the amounts paid in by the stockholders. Public Laws, 1927, chap. 113, sec. 1, 218(c) (13).

In *Corporation Commission v. Murphey,* 197 N. C., 42, the Court construed this statute and declared it to be valid. The statute, it was said, does not contravene the due process clause or indeed any other clause of the Federal or of the State Constitution; the stockholder is not denied the right of a hearing for the reason that before execution may be issued he may appeal from the assessment to the Superior Court of the county in which the liquidation is pending and there litigate all matters, whether of law or of fact, relating to his liability on the assessment. His appeal stays execution until final judgment is rendered. It was concluded that by this procedure the stockholder is given full opportunity to be heard before his property can be appropriated and that the assessment is not a judgment in the sense that it cannot be attacked.

The opinion was written upon the assumption that stockholders are in the normal control of their faculties and not with reference to the contingency of "a human mind in ruins." This becomes obvious by reference in the opinion to the stockholder's right to petition the judge to relieve his property of the lien pending settlement of questions raised by the appeal and to the notice of liability with which the stockholder is affected by an adjudication that the bank has become insolvent and by the filing of a copy of the assessment in the office of the clerk. The present case does not rest on this assumption. T. E. Holding did not appeal from the assessment; when it was made he was without mental capacity; he was in a hospital for treatment; he had no guardian.

The rule is substantially uniform that a judgment against an insane person not previously declared insane is not void but voidable and that it will generally be sustained when collaterally attacked. *Odom v. Riddick,* 104 N. C., 515; *Craddock v. Brinkley,* 177 N. C., 125; *Bank v. Duke,* 187 N. C., 386; *Clark v. Homes,* 189 N. C., 703; *Wadford v. Gillette,* 193 N. C., 413. But in such an instance relief may be administered when sought as between the parties by motion in the cause, or by an independent action. If there is a mere semblance of service upon a person of nonsane mind and a judgment is obtained against him "contrary to the course and practice of the court" it may be vacated on the ground of irregularity. But a judgment given without service of original or other timely process and without appearance in person or by attorney is void, and may be so regarded whenever and wherever offered. *Duffer v. Brunson,* 188 N. C., 789; *Condry v. Cheshire,* 88 N. C., 375.

In *Corporation Commission v. Murphey, supra,* it was held that an assessment cannot be made against a stockholder in an insolvent banking corporation without notice to him or without an opportunity to be heard as to the validity of the assessment; and therein is pointed out the expediency of giving actual notice of a purpose to levy the assessments.

If these safeguards are required for the protection of persons of sound mind, *a fortiori* are they essential to the protection of those who by reason of disordered mental condition are unable to protect themselves. As to the mode of service analogy may be found in the statutory method of serving a summons. If the action is against a person judicially declared to be of unsound mind or incapable of conducting his own affairs for whom a committee or guardian has been appointed a copy of the summons must be delivered to the committee or guardian and to the defendant personally. C. S., 483(3). If the declared incompetent has no committee or guardian service of notice may be made upon him personally or the notice may be returned without actual service with the endorsement required by the statute when service cannot be made without the danger of injury to him; but in no event should final judgment be rendered against him without adequate notice to his committee, or to his general or testamentary guardian, or to a guardian *ad litem* duly appointed by the court. In this case T. E. Holding was not affected by constructive notice and of actual or personal notice upon him or his representative there is neither semblance nor color. Judgment

Affirmed.

A. D. BURROWES, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF RALEIGH, v. D. P. FRANKS, MARGARET SMITH TERRY, ELIZABETH SMITH, F. L. TERRY, GUARDIAN AD LITEM OF NELLIE SMITH, AND ROBERT Y. SMITH, JR., INFANTS.

(Filed 22 November, 1933.)

Wills F d—Where devisee makes election the land passes under the will unaffected by devisee's deed evidencing such election.

Where a devisee under a will is put to her election to take the land devised and relinquish to her cotenant her title as tenant in common in other lands, and the devisee elects to take the land devised, and as evidencing her intent to so elect, executes a quit-claim deed to her cotenant and the husband of the cotenant, the cotenant takes the whole tract of land in fee under the will notwithstanding the language of the quit-claim deed to her and her husband, and not as a tenant by the entireties, and where, upon her death intestate, the lands are partitioned among her children as her heirs at law, they take the lands allotted to them in fee subject to the life estate of the husband, and free from any disposition of the lands the husband may seek to make by will.

APPEAL by defendants from *Harris, J.*, at September Term, 1933, of WAKE. Affirmed.

This is an action for the specific performance of a contract by which the defendant, D. P. Franks, agreed, in writing, to purchase of the plaintiff two tracts of land, situate in Wake County, and described in the complaint. The said defendant declined to accept the deed tendered to him by the plaintiff, and to pay the contract price for said land, on his contention that the plaintiff is not the owner in fee of one of said tracts. He contended that the defendants other than himself are the owners in fee simple of said tract, subject to the life estates of their mother, Mattie A. Smith and their father, Robert Y. Smith.

The action was tried on a statement of facts agreed. On these facts the court was of opinion that plaintiff is the owner in fee simple of both the tracts of land described in the complaint, and that the deed tendered to the defendant, D. P. Franks, by the plaintiff, is sufficient to convey and does convey both said tracts to the said defendant in fee simple.

It was adjudged that the plaintiff recover of the defendant, D. P. Franks, the sum of $1,350, the amount due on the purchase price of the two tracts of land described in the complaint, and that plaintiff has a lien on said tracts of land for the payment of said sum. The defendants appealed from the judgment to the Supreme Court.

Briggs & West for plaintiff.
Gatling & Morris for defendant, D. P. Franks.
J. E. Pearson for other defendants.

CONNOR, J. On 9 October, 1868, Simeon J. Utley and his wife, Martha Ann Utley, executed a deed by which in consideration of their natural love and affection for him, they conveyed to their son, Bennett Utley, in fee simple, a tract of land situate in Wake County, and containing 138 acres, more or less. This deed was duly recorded in the office of the register of deeds of Wake County. Bennett Utley, the grantee in said deed died some time prior to 1880, intestate, and leaving as his only heirs at law his sisters, Anna Lalon Adams, wife of George B. Adams, and Susan F. Harris, wife of Aaron L. Harris. Upon the death of their brother, his sisters entered into possession of the said tract of land, as tenants in common, and remained in possession as such until some time after the death of their father, Simeon J. Utley.

Simeon J. Utley died during the year 1880. He left a last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Wake County. By this will he devised to his daughter Susan F. Harris a certain tract of land situate in Wake County, containing 72 acres, more or less, which he owned in fee simple at his death. He also devised to his daughter, Anna Lalon Adams, a certain tract of land situate in Wake County, containing 104 acres, more or less, reciting in said will that this devise was made to his said daughter "for and in consideration of the transfer of her interest in the real estate of Bennett R. Utley, deceased, to the said Susan F. Harris and her heirs." Both the said Susan F. Harris and the said Anna Lalon Adams entered into possession, under said will, of the tracts of land devised to them respectively, therein.

On 13 November, 1880, George B. Adams and his wife, Anna Lalon Adams, executed a deed by which for and in consideration of the devise to the said Anna Lalon Adams of the 104-acre tract to her by her father, Simeon J. Utley, they quitclaimed to "Aaron L. Harris and his wife, Susan F. Harris and their heirs," all the right, title, interest and estate of Anna Lalon Adams in and to the tract of land which descended to her and to the said Susan F. Harris, as heirs at law of Bennett Utley. This deed was duly recorded in the office of the register of deeds of Wake County.

Susan F. Harris died intestate during the year 1898, leaving surviving her husband, Aaron L. Harris, and her children: (1) Mattie A., who married Robert Y. Smith; (2) Hettie V., who married Junius H. Smith; and (3) Ann, who married L. D. Stephenson. The children of the said Susan F. Harris thereafter caused the lands which had descended to them as her heirs at law, including the 138-acre tract to be duly partitioned among them. The share allotted to Mattie A. Smith, wife of Robert Y. Smith, in said partition, included the southern half of the 138-acre tract.

Aaron L. Harris survived his wife, Susan F. Harris, and died in 1916. He left a last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Wake County. Item 3 of said will is as follows:

Item 3. My tract of land containing 138 acres, situate in Panther Branch Township, Wake County, in said State which was conveyed to me and my wife, Susan F. Harris, jointly by George B. Adams and wife, Anna Lalon Adams, by deed recorded in the office of the register of deeds of Wake County in Book 64, page 161, I desire divided into two equal parcels by a line running due east and west direction. The southern half of said tract, 69 acres, less two acres, devised to Hettie V. Smith, I give and devise to my daughter Mattie A. Smith, the wife of R. Y. Smith, during the term of her natural life, and if she should die before the death of her husband, then to her husband R. Y. Smith during his natural life, and after the death of both the said Mattie A. Smith and her husband, R. Y. Smith, I give and devise said tract of land to the children of my said daughter, Mattie A. Smith, and their heirs."

On 16 September, 1929, the sheriff of Wake County executed a deed by which he conveyed to the Commercial National Bank of Raleigh, in satisfaction of an execution in his hands issued upon a judgment against Robert Y. Smith and his wife, Mattie A. Smith, all their right, title, interest and estate in and to the southern half of the 138-acre tract of land above referred to. The plaintiff, as receiver of the Commercial National Bank of Raleigh, has contracted to sell and convey to the defendant, D. P. Franks, in fee simple, the said southern half of the said 138-acre tract of land, and has tendered to said defendant a deed in performance of his contract. The said defendant has declined to accept said deed and to pay the amount due as purchase money for said tract of land, on the ground that plaintiff is not the owner in fee simple of the said tract of land. At the trial in the Superior Court, it was ordered, adjudged and decreed that plaintiff is the owner in fee simple of said tract of land, and that he recover of the defendant, D. P. Franks the amount due by him as the purchase money for the lands described in the complaint.

At the death of Susan F. Harris in 1898, the 138-acre tract of land, which she then owned in fee simple, descended to her children, as her heirs at law, subject, of course, to the life estate of her husband, Aaron F. Harris, who survived her, and died in 1916. The quit-claim deed executed by George B. Adams and his wife, Anna Lalon Adams in 1880, did not create an estate by the entireties in the said Susan F. Harris and her husband, Aaron F. Harris, notwithstanding its language. The only purpose and effect of this deed was to evidence the election of Anna

Lalon Adams to take the land devised to her by her father, Simeon J. Utley, by his last will and testament, subject to the provision of said will, with respect to her interest in the 138-acre tract, in which she then owned an undivided one-half interest, as an heir at law of her brother, Bennett Utley, deceased. As required by said will, she elected to transfer her interest in said land to her sister and cotenant, Susan F. Harris, and her heirs. Susan F. Harris thereby became the owner in fee of the entire tract of land. Her husband, Aaron F. Harris, although named in the quit-claim deed, jointly with his wife, acquired no right, title, interest or estate in said land under or by virtue of said deed, which he could devise by his last will and testament in derogation of the title of the heirs at law of Susan F. Harris.

In *Garris v. Tripp,* 192 N. C., 211, 134 S. E., 461, it is said: "It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife, that the spouses be jointly entitled as well as jointly named in the deed. Hence if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman she is presumed to have acted under the coercion of her husband."

This principle which is well settled as the law, is applicable in the instant case. There was no error in the trial of the action, and the judgment is

Affirmed.

W. T. GREENE v. E. L. CARROLL AND J. E. CARROLL, TRADING AS ROXIE THEATRE.

(Filed 22 November, 1933.)

1. **Evidence H e—Testimony by defendant's employee as to admission of party under whom plaintiff claims held incompetent as hearsay.**

   In an action by the assignee of a lease against the lessor to recover certain lamps and equipment used in a moving picture theatre, the assignee claimed title by purchase from the lessee, and the lessor claimed that the lamps had been substituted for the original fixtures by the lessee and that by agreement title thereto remained in the lessor: *Held,* testimony of a former employee of the lessor as to a conversation between the lessor and the lessee in which the lessee admitted title in the lessor is incompetent as hearsay, and was properly excluded.

2. **Evidence B a—Where plaintiff makes out prima facie case the burden of going forward with the evidence shifts to defendant.**

   The burden is on plaintiff seeking to recover certain articles of personal property to prove his title, but where he has made out a prima facie case of ownership by showing his purchase of the property from a third person, the burden of going forward with the evidence shifts to defendant to show the particular facts upon which he bases his claim of title, and under the facts of this case the court's use of the expression the "burden shifts" to the defendant is held not prejudicial, the court charging that the burden of the issue was on plaintiff.

3. **Estoppel C a—Owner failing to assert title under circumstances calling for such assertion is estopped as against subsequent purchaser.**

Where a lessee of a moving picture theatre, the plaintiff in the action, claims title to certain personal property as purchaser from a former lessee, evidence tending to show that he had told the lessor of the theatre, the defendant, that he was going to purchase the property from the former lessee, establishes a situation calling for an assertion of title thereto by the lessor, if any he has, and his failure to do so will estop him from claiming the property after the plaintiff has bought the property and paid for it, and the evidence in this case is held to support the trial court's instruction on this aspect of the case.

STACY, C. J., dissents.

APPEAL by defendants from *Harding, J.*, and a jury, at August Term, 1933, of GASTON. No error.

Since the beginning of this action J. R. (J. E.) Carroll, one of the defendants, has died, and E. L. Carroll has been duly appointed as administrator of his estate and made party defendant to this action.

This was a civil action, brought by plaintiff against defendants to recover certain personal property and the ancillary remedy of claim and delivery was taken out.

Plaintiff contends in his complaint that he was the owner of certain lights known as Strong Lamps (and a stove, which having been delivered, was not in controversy) claiming to have purchased them from one Beam, who was a lessee of the defendants of a picture theatre in Bessemer City. That after a fire in the picture theatre canceling the lease in accordance with its terms, the plaintiff demanded to have the lights turned over to him, and defendants refused. The plaintiff based his claim to the property on his purchase from Beam, alleging that the lights were never the property of the lessors, the defendants, not being included in the lease.

The defendants contend in their answer that the lights were their property, having been substituted by agreement with Beam for the lights that were in and part of the equipment of the picture theatre when leased by said Beam, and that the defendants had never parted title to the same, either to Beam or to Greene. There was evidence to sustain the contentions of the plaintiff and defendants.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the plaintiff the owner of and entitled to the possession of the property described in the complaint? Answer: Yes.

2. Does the defendant wrongfully withhold possession of the same from the plaintiff? Answer: Yes.

3. What was the value of the property at the time of the commencement of this action? Answer: $600.00.

4. What damage, if any, is plaintiff entitled to recover of the defendants by reason of the wrongful detention of the property described in the complaint? Answer: 6 per cent from the date of the issuing of the summons in this case answered by the judge as a matter of law based on the jury's answer of first, second and third issues."

The court below rendered judgment on the verdict. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts and material exceptions and assignments of error will be set forth in the opinion.

John A. Wilkins for plaintiff.
S. J. Durham for defendants.

CLARKSON, J. Plaintiff, W. T. Greene, testified in part: "Operated the Roxie Theatre at Bessemer City, N. C., leasing it from Ennis Beam of Shelby, N. C., purchasing from Beam two Strong lamps and rectifiers, which were in the theatre at Bessemer City, paying Mr. Beam one thousand dollars for them. They are not connected with the machine. Had conversation with Mr. Beam in presence of defendant, E. L. Carroll. (By the Court: Just state what you said and what they said.) We went over there and told Mr. Carroll that I had purchased the property. (By the Court: Who do you mean by 'we'?) Mr. Beam and Mr. Plummer and I. We went to Bessemer City and saw Mr. Carroll there, Mr. E. L. Carroll, and I told him that I had bought these Strong lamps and stove, and I was going to operate the theatre and he said it was agreeable to him. (The Court: Who is 'he'?) Mr. Carroll said it was agreeable with him—that all he was looking for was the rent from the building. Mr. Carroll did not indicate that he had claim on the lamps, and I did not know he had a claim on them. Did not know that Mr. Beam was liable to Mr. Carroll for them. Carroll did not indicate Beam was liable for them to him. . . . I asked Mr. Carroll if he would charge me anything to leave the lamps in the building, and he told me he might want to buy them from me if he fixed up the theatre, and it would be all right for me to leave them. I demanded the lamps afterwards and he told me I could not move them. That was my first intimation that he claimed them. He allowed me to move no equipment. Said that Mr. Beam owed his rent and he did not want to turn the lamps loose until rent was paid. I took claim and delivery for the property."

The defendant E. L. Carroll testified, in part: "My equipment was complete with lights at time I leased to Mr. Beam, and Mr. Beam by agreement with me exchanged my light for the Strong lamps. The Strong lamps and rectifiers substituted the lights I had. Mr. Beam traded my lights for the Strong lamps. I never sold to Mr. Beam or to Mr. Greene, my lighting equipment, and they have never tendered me my lights back. Mr. Beam and I agreed that he might swap the lamps, and the lamps he got were to be substituted for mine. A fire happened after about three months."

D. H. Payne testified: "Operated the Roxie Theatre both before and after the fire for Mr. Carroll and his brother. Q. State whether or not you have heard Mr. Beam make any statement with respect to the title of Mr. Carroll and his brother or Mr. Greene. (Objection by plaintiff; sustained, exception.) (If allowed to answer, Mr. Payne would have said 'Yes.') Q. Whose (lamps) did he say they were? (Objection by plaintiff; sustained, exception.) (If allowed to answer Mr. Payne would have said 'Mr. Carroll.') I was operating the theatre before the lease and it had Mazda lights, which were the usual lights at that time. After the fire there were Strong lamps there, the Mazda lamps had been removed. It would not have been a complete picture machine without lights. (Cross-examination): The lamps were attached to the machine with two rods running through the frame." Defendant offers subpœna for Mr. Beam. It is endorsed "not to be found."

We do not think the exceptions and assignments of error can be sustained.

In 10 R. C. L., part sec. 132, p. 958, the following principle is laid down: "Hearsay denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person. Such evidence is generally inadmissible to prove or disprove a material fact involved in the issue between the parties. The reason for this rule of exclusion is that hearsay is not subject to the ordinary tests required by law for ascertaining its truth, the author of the statements not being exposed to cross-examination in the presence of a court of justice, and not speaking under the penal sanction of an oath, there being no opportunity to investigate his character and motives, and his deportment not being subject to observation." N. C. Handbook of Evidence (Lockhart-Rucker, 2d ed., 1931), sec. 138; *S. v. Lassiter,* 191 N. C., 210; *S. v. Green,* 193 N. C., 302; *S. v. Blakeney,* 194 N. C., 651; *S. v. Simmons,* 198 N. C., 599.

There are exceptions to the general hearsay rule that it is unnecessary to discuss, as we do not think this comes under any exception. In fact, the learned counsel for defendant cites no authority to support his contention that this hearsay evidence is admissible.

The defendants contend that the charge on the burden of proof was erroneous. We think not, under the facts and circumstances of the case.

The plaintiff contended that he was the owner of the property and had purchased it from Beam. The defendants denied this, and contended that they were the owners and that they had certain lamps and that they and Beam agreed that he might "swap" the lamps, and the lamps he received were to be substituted for theirs. The charge of the court on this aspect, was: "The court charges you, gentlemen, if you shall find by the greater weight of the evidence, the burden being on the plaintiff, that he bought this property from Beam and paid him for it and nothing else appearing, the plaintiff became the owner of it. That would make it a prima facie case of ownership, and nothing else appearing, plaintiff, Greene, then became the owner of the property. He bought it from Beam. Then the burden shifts to the defendants and if the defendants have satisfied you that there was an agreement between Beam and the defendants that Beam should be permitted to take the Mazda lamps over to Charlotte and swap them off and get other lamps and put in the place, and the new lamps should be substituted for the old lamps, then the court charges you that Beam had no title. Even though he paid a thousand dollars for it. The burden is on defendants to satisfy you there was such agreement. . . . The burden is on the plaintiff to satisfy you that he is the owner of the property, and if he has so satisfied you by the greater weight of the evidence, you will answer the issue 'Yes.' If he has failed to so satisfy you, you will answer it 'No.'"

In *Speas v. Bank,* 188 N. C., 524 (530-1), we find the following: "Ordinarily, the burden of proof is on the plaintiff, for he usually has the burden of the issue. Especially is this so where the defendant simply traverses the allegations of the complaint under a general denial, or where he undertakes to establish facts and circumstances, not by way of confession and avoidance, but in denial of the allegations upon which plaintiff seeks to recover. Chamberlayne Ev., secs. 944 and 947. But in many cases the burden of proof is on the defendant, either as to the whole case, or on some of the issues properly joined. He has the burden of establishing all affirmative defenses, whether they relate to the whole case or only to certain issues in the case. As to such defenses, he is the actor, and hence he must establish his allegations in such matters by the same degree of proof as would be required if he were plaintiff in an independent action. This is not a shifting of the burden of proof; it simply means that each party must establish his own case. *Austin v. R. R.,* 187 N. C., 7; *Page v. Mfg. Co.,* 180 N. C., 330; *Shepard v. Tel. Co.,* 143 N. C., 244." N. C. Handbook of Evidence, *supra,* sec. 224. The use of the expression the "burden shifts" in the charge is not prejudicial, the charge meant that each party must establish his own case. Under the facts and circumstances of this case, we do not think the charge prejudicial. The court charged the jury as follows: "If you find that Greene, before he went into possession or paid any money for it, or consummated the contract, went to see Carroll and told him he was about to buy this property and also the theatre—to sublet it—and Carroll said it was agreeable to him, that all he wanted was his rent, and Carroll sat up, knowing he was the owner of the property by the fact of substitution, and let Greene go ahead and buy from Beam, then Carroll is estopped to deny title. Because if Carroll owned those lamps by virtue of the contract of substitution and Greene came to him and told him he was buying those lamps outright from Beam, it was then his duty to speak up and say Beam didn't own them—that it belonged to him. If you buy, you do so at your own peril. If he was informed and Carroll sat up and didn't say a word about it, he is estopped. If you find that Greene actually purchased the property from Beam and the defendant made no claim of title." *Winstead v. Farmer,* 193 N. C., 405; *Thomas v. Conyers,* 198 N. C., 229 (234); *S. v. Wilson, ante,* 376.

Defendants contend that the charge, though correct as a legal proposition, does not arise on the evidence of plaintiff. We cannot so hold. We think the evidence is susceptible of the view the court below took of it in the charge to the jury, at least it is not prejudicial.

We think the motion of defendants for judgment as of nonsuit at the close of all the evidence, C. S., 567, cannot be sustained. We see no error in the judgment, we think it is in accordance with the authorities. 23 R. C. L., p. 911; C. S., 610; *Trust Co. v. Hayes,* 191 N. C., 542; *Polson v. Strickland,* 193 N. C., 299; *Harrell v. Tripp,* 197 N. C., 426, 428.

The main question in this controversy was one of fact for the jury to determine. They have found for plaintiff, in law we find

No error.

STACY, C. J., dissents.

F. I. SUTTON, EXECUTOR OF MRS. W. R. LOFTIN, DECEASED, v. E. B. DAVIS AND H. STADIEM, SURETY.

(Filed 22 November, 1933.)

1. **Supersedeas B b—Where principal is discharged in bankruptcy before final judgment surety on stay bond is also discharged.**

   The liability of a surety on a bond given in accordance with C. S., 1526 to stay execution of a judgment of the justice of the peace pending appeal, C. S., 1525, attaches when or if final judgment is rendered against the principal, and where the principal has been relieved of liability by a discharge in bankruptcy pending the appeal, plaintiff's claim being filed in the schedule in bankruptcy, no final judgment is rendered against the principal, and the surety may not be held liable on the stay bond.

2. **Same: Statutes B b—Statute providing for liability of surety on stay bond upon discharge of principal in bankruptcy is prospective in effect.**

Chapter 251, Public Laws of 1933, amending C. S., 1526, so as to retain the liability of a surety on a stay bond upon appeal from a justice of the peace in the event the principal is discharged in bankruptcy pending the appeal, is prospective in effect and does not apply to bonds executed prior to its effect. As to whether a statute would be valid which attempted to change the liability of a surety on bonds executed prior to its passage, *quære?*

3. **Judgments G b—Judgment rendered after term by consent of parties relates back to trial term.**

Where, upon the call of a case for trial in the Superior Court on appeal from a magistrate's court, it is determined that the defendant had been discharged in bankruptcy pending the appeal, and it is agreed by the parties that the question of the liability of the surety on defendant's stay bond should be determined after the adjournment of the term, the judgment later rendered is *nunc pro tunc* and relates back to the term at which the action was called for trial, and the liability of the surety on the stay bond is not affected by the fact that the effective date of a statute relating to the surety's liability in such cases intervenes between the trial term and the date judgment is actually rendered.

APPEAL by plaintiff from *Harris, J.*, at May Term, 1933, of LENOIR. Affirmed.

The stipulations of counsel are as follows:

"1. That after the rendition by K. F. Foscue, justice of the peace, of judgment in this action, and prior to the May Term, 1933, of the Superior Court of Lenoir County, E. B. Davis was adjudged a voluntary bankrupt in the United States District Court for the Eastern District of North Carolina, and had received his discharge in bankruptcy.

2. That such discharge, which was exhibited to Judge Harris, as set out in his judgment, was in all respects regular in form and effected the discharge of said bankrupt as to his dischargeable debts.

3. That the indebtedness alleged to be due Mrs. Loftin and evidenced by the said judgment of K. F. Foscue, justice of the peace, was duly scheduled by the bankrupt, and Mrs. Loftin, the original plaintiff, had actual knowledge and notice of the bankruptcy proceedings.

4. That this stipulation and the summons, judgment, with notice of appeal, and return of appeal, of K. F. Foscue, J. P., application to clerk for order to stay execution, and order of the clerk allowing bond to stay execution, surety thereon, order of clerk staying execution after bond given, order at February Term, 1933, making F. I. Sutton executor of Mrs. W. R. Loftin, plaintiff herein, and judgment of Judge Harris at May Term, 1933, shall constitute the case on appeal herein."

The stipulation of counsel in the addenda to record, are as follows:

"1. That this cause was calendared for trial at the February Term, 1933, of the Superior Court of Lenoir County, and upon being called for trial a jury was empaneled to try the issues raised, but upon the defendant, Davis, exhibiting his discharge in bankruptcy the case was withdrawn from the jury and heard by the judge at said term.

2. That judgment was tendered by the defendants at the February Term, 1933, in all respects as set out in the record except that the same was dated 'February Term, 1933,' instead of 'May Term, 1933,' as appears in the record.

3. That the judgment of the court was reserved by the court at the request of the plaintiff, and it was agreed by counsel for the plaintiff and counsel for defendants that judgment might be signed at some later date.

4. That the judgment as set out in the record was signed at the May Term, 1933, by the same judge who presided at said February Term, 1933.

5. That the voluntary petition in bankruptcy of E. B. Davis was filed on 12 January, 1932, and he was adjudicated a bankrupt on the next day, 13 January, 1932."

The judgment of the court below is as follows:

"This cause coming on to be heard and being heard before his Honor, W. C. Harris, judge presiding, and it appearing to the court that this was an action instituted by Mrs. W. R. Loftin against the defendant, E. B. Davis, for the recovery of the sum of $150.00, for rental alleged to have been due by the defendant to the said Mrs. W. R. Loftin, and from a judgment rendered in said action in favor of the said Mrs. W. R. Loftin, the defendant appealed to the Superior Court, and that the said plaintiff, Mrs. W. R. Loftin, has since the institution of this action, died, and F. I. Sutton qualified as executor of her estate and is a party plaintiff herein; and it further appearing to the court upon the call of this matter for trial at this term of court, upon the appeal from the judgment of the justice of the peace, that after the rendition of the judgment by the said justice of the peace, the defendant, E. B. Davis, filed a petition in bankruptcy in the United States District Court for the Eastern District of North Carolina, and listed therein the claim of the plaintiff herein against him as an indebtedness, and that the said defendant, E. B. Davis, has been granted a general discharge in bankruptcy by the said United States District Court for the Eastern District of North Carolina, and that the defendant duly exhibited his discharge in bankruptcy in court upon the call of this case for trial and pleaded the same in bar of the plaintiff's right of recovery, and that the said defendant by said bankruptcy has been fully and completely discharged from any and all liability to the plaintiff in this action.

It is now, therefore, ordered, adjudged and decreed that the plaintiff is not entitled to recover of the defendant in this action or the sureties on the bond given by the defendant to stay execution, and that said defendant, E. B. Davis, and the sureties on his said stay bond are discharged from any and all liability on account of the alleged indebtedness due the plaintiff.

It is further ordered that this action be, and the same is hereby dismissed. W. C. HARRIS, *Judge Presiding.*"

The only exception and assignment of error was to the judgment as signed.

John G. Dawson and Geo. B. Greene for plaintiff.
Wallace & White for defendant.

CLARKSON, J. The question involved: Whether the surety on a bond given 4 August, 1928, under C. S., 1526, upon appeal from judgment rendered in justice's court to the Superior Court, is relieved from liability by discharge in bankruptcy of his principal, obtained while the appeal was still pending, and pleaded in bar of recovery at the time of trial in the Superior Court? We think so.

C. S., 1525, provides for stay of execution on appeal. C. S., 1526, is as follows: "The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties." This section was amended by Public Laws, 1933, chapter 251, which reads as follows: "Section 1. That section 1526 of Consolidated Statutes be, and the same is hereby, amended by adding at the end of said section, the following sentence: 'And in the event that said defendant shall prior to entry of the final judgment be adjudicated a bankrupt, then and in that event, the surety or sureties on said bond shall remain bound as if they were codebtors with the defendant and the plaintiff may continue the prosecution of the action against said sureties, as if they were codefendants in the cause.' Section 2. That all laws and clauses of laws in conflict with said amendment are hereby repealed. Section 3. That this act shall be in full force and effect from and after its ratification. Ratified this 10 April, A.D. 1933."

It is admitted by plaintiff that defendant Davis pleaded his discharge in bankruptcy in bar of recovery and that he duly listed among his liabilities the judgment of Mrs. Loftin and that she had actual knowledge of the bankruptcy proceedings. It seems, therefore, that the plaintiff, in any event, cannot recover against the defendant Davis, and the only question on this appeal is whether or not the plaintiff can recover from the defendant Stadiem as surety on the bond executed by the defendant Davis.

We think the decision in *Laffoon v. Kerner,* 138 N. C., 281, decisive of this controversy. In that decision, at p. 206, speaking to the subject, we find: "It would seem too clear for discussion that if no judgment can be rendered against the appellant because of a discharge in bankruptcy pending the appeal, the contingency upon which the sureties are liable can never arise. *Fontaine v. Westbrooks,* 65 N. C., 528. It is said by *Waite, C. J.,* in *Wolf v. Stix,* 99 U. S., 7 (8), 'The cases are numerous in which it has been held and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bond, and the like.' . . . (p. 287.) We are of the opinion that upon the exhibition of the certificate of discharge, unless the plaintiff had shown that the debt was not scheduled and unless he had no notice of the proceeding in bankruptcy, the court should have dismissed the action." *Murray v. Bass,* 184 N. C., 318; *McCormick v. Crotts,* 198 N. C., 664.

This Court, in approving and distinguishing the *Laffoon case, supra,* in *Murray v. Bass, supra,* said, at p. 321: "In *Laffoon's case, supra,* the liability of the surety on the supersedeas bond had not become fixed and absolute when the principal named thereon obtained his discharge in bankruptcy, and exhibited same to the court after plea setting up the fact; not so here. This, we apprehend, is a vital and important difference between the two cases. The contingency upon which the sureties in *Laffoon's case, supra,* agreed to pay the judgment never happened—the discharge in bankruptcy of the defendant having destroyed plaintiff's debt before the liability of the sureties thereon became fixed necessarily worked a dismissal of the action and a release of the sureties. *Payne v. Able,* 7 Bush. (Ky.), 344; 2 Am. Rep., 316. But here the contingency, upon which W. H. Murray agreed to pay Bass' judgment, has happened, and his liability therefor has become fixed and absolute; and this before any discharge in bankruptcy relieving R. Pittman Barnes from its payment. W. M. Murray, therefore, at the present time, stands in the position of a codebtor. Section 16 of the Bankrupt Act of 1 July, 1898 (U. S. Comp. St. sec. 9600), which does not seem to have been amended or changed by subsequent legislation, reads as follows: 'The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.' "

Plaintiff in the brief says: "We would be lacking in frankness if we did not say we think the construction of the statute in the *Laffoon case* entirely too narrow, as that construction tends to defeat rather than to accomplish the manifest purpose of the statute, which is to protect the judgment creditor pending appeal against the insolvency of the judgment debtor." We think the *Laffoon case* was well considered and ably written by *Justice H. G. Connor,* and supported by the weight of authorities.

From the stipulation of counsel, we think a just construction is that the judgment signed at May Term, 1933, was by consent *nunc pro tunc,* and relates back to February Term, 1933, before the amendment of C. S., 1526, was ratified 10 April, 1933, and therefore not applicable to this controversy. The amendment to C. S., 1526, by the act of 1933, is prospective and not retroactive. Statutes must be construed as having only prospective operation unless retrospective effect is declared or necessarily implied. *Ashley v. Brown,* 198 N. C., 369. Statutes are presumed to operate prospectively only. *Hicks v. Kearney,* 189 N. C., 316.

The defense of the statute of limitation being considered a vested right, which cannot be taken away by legislation, we see no good reason why the same principle is not applicable in the present case. *Wilkes Co. v. Forester,* 204 N. C., 163. The judgment of the court below is

Affirmed.

DEAN HAMMOND ET AL. v. THE CITY OF CHARLOTTE ET AL.

(Filed 22 November, 1933.)

1. **Statutes C b—Repeal by implication is not favored, and special statute will be upheld as exception to general statute.**

   The repeal of statutes by implication is not favored, and several statutes dealing with the same subject-matter will be reconciled if possible by any reasonable construction, and a special statute in conflict with a later general statute will be considered an exception to the general statute and upheld on this theory unless the legislative intent to repeal the special statute is apparent.

2. **Schools and School Districts D a—Private law authorizing school commissioners to fix budget not repealed by ch. 430, Public Laws, 1931.**

   The provisions of chapter 342, Private Laws of 1907, authorizing the school commissioners of the city of Charlotte to employ and fix the salaries of teachers in its public schools and to adopt a school budget for the city, is not repealed by chapter 430, Public Laws of 1931, the general statute dealing primarily with the six-months term of school, and its provisions requiring the school budget of a county or city to be approved by the State Board of Equalization, and establishing a method of making a school budget, etc., applying only to counties and cities receiving aid from the State for an extended term of school, and the city of Charlotte not receiving such aid for an extended term during a school year, the budget of its school committee for such year is not affected by a reduction in the schedule of salaries for its teachers ordered by the State Board of Equalization, where the city authorities refused to accept such reduction. The difference in the repealing clause of chapter 562, Public Laws of 1933, is pointed out.

APPEAL by defendants from *Hill, Special Judge,* at October Term, 1933, of MECKLENBURG.

This is an action to enforce the collection of a tax levied for the payment of a part of the salaries of the teachers and principals in the city schools of the city of Charlotte for 1932-1933, and for the full payment of the salaries withheld until it should be determined whether the amount represented by the reduction made by the State Board of Equalization could be legally expended. Trial by jury was waived and the court found the facts.

The school commissioners of the city of Charlotte is a corporation. By the charter of the city it is empowered to establish and maintain one or more high schools, to purchase sites, provide buildings, and to employ principals and teachers and to fix their salaries, subject to the limitation that the compensation of teachers should not make necessary the levy of an annual tax in excess of thirty cents on the hundred-dollar valuation of property and ninety cents on the poll. It is made the duty of the governing body of the city to levy a tax, subject to this limitation, for the support and maintenance of the system of public schools in the city.

The school commissioners duly adopted a salary schedule for the teachers to be employed in the public schools of the city for 1932-1933 and employed the principals and teachers for the year, fixing their salaries in accordance with the schedule; and after ascertaining the amount available from the State for the payment of salaries for the six-month term the school commissioners adopted a budget of amounts to be expended from funds to be raised by taxation pursuant to the charter of the city for the purpose of paying the salaries, fixing the sum to be raised at an amount which, added to the State fund for the six-month term, would be sufficient to pay the salaries in accordance with the schedule. This budget was approved by the governing body of the city.

The budget was sent to the State Board of Equalization, and this board reduced the amount proposed for instructional services to the extent of $35,032.25; whereupon the school commissioners adopted a resolution refusing to reduce its budget and requested the governing body of the city to levy a school tax sufficient to provide for the budget as originally adopted. To provide for said budget as originally adopted a tax of 25.75 cents on the one hundred dollars of property was needed for the purpose of current expenses and capital outlay, and included in current expenses was the item allotted for instructional services, which would be used in payment of the salaries of the plaintiffs as principals and teachers. The governing body of the city duly complied with the resolution of the school commissioners and levied a tax for school purposes in the amount requested by said school commissioners, said tax being sufficient in amount to provide for the payment of the salaries of the plaintiffs as teachers and principals in accordance with the schedule adopted by the school commissioners and in accordance with the salary schedule upon which the plaintiffs were employed. The governing body of the city thereby approved the action of the board of school commissioners in refusing to reduce its budget in the manner attempted by the State Board of Equalization.

The plaintiffs duly complied with the terms of their employment, and in reliance thereon, worked the entire school year 1932-1933, and fully and completely discharged all the conditions and obligations resting upon them by reason of said employment.

Notwithstanding these facts the school commissioners of the city have refused to pay to the plaintiffs seven and one-half per cent of the salaries for the year 1932-1933, amounting in the aggregate to $35,032.25, being the amount by which the State Board of Equalization attempted to reduce the part of the budget adopted by the school commissioners of the city allocated to instructional services.

The defendants base their refusal to pay the seven and a half per cent of the salaries of the plaintiff retained on the uncertainty as to their legal rights to pay the same, and have expressed their intention in their answer to refuse to pay the same even after all the taxes are collected.

The court adjudged that the plaintiffs are entitled to the relief prayed. The defendants excepted and appealed.

Bridges & Orr for appellants.
John M. Robinson and Hunter M. Jones for appellees.

ADAMS, J. The power of the board of aldermen of the city of Charlotte to levy an annual tax for the maintenance of public schools in the city as well as that of the board of school commissioners to employ teachers and fix their salaries is derived from a private act of the General Assembly. Private Laws, 1907, chap. 342, secs. 197, 199, and 206 as amended. The appellants seem to concede that the judgment must be affirmed unless the act conferring this power is repealed by chapter 430 of the Public Laws of 1931. The latter act provides (sec. 31) that all laws and clauses of laws in conflict with it, to the extent of such conflict only, are repealed and that if any section, part, paragraph, sentence, or clause be declared unconstitutional or invalid the validity of any remaining part of the act shall not be affected. The public act contains no express repeal of the private act under which the defendants have proceeded and differs in this respect from the repealing clause in chapter 562 of the Public Laws of 1933, which includes all Public, Public-Local, and Private Laws.

It is a settled principle, subject to exceptions, that where a public or general and a private or special statute relate to the same subject and the two are essentially inconsistent the special statute shall prevail on the theory that it is an exception to the former. *Bramham v. Durham,* 171 N. C., 196; *Rankin v. Gaston Co.,* 173 N. C., 683; *Wilson v. Comrs.,* 183 N. C., 638; *Monteith v. Comrs.,* 195 N. C., 71. A local statute enacted for a particular municipality is usually treated as an exception intended for the benefit of the municipality. *Felmet v. Comrs.,* 186 N. C., 251; Black on Interpretation of Laws, 117. It is true that the legislative intent must prevail; but as was said in *S. v. Johnson,* 170 N. C., 685, "A general law will not be so construed as to repeal an existing particular or special law unless it is plainly manifest from the terms of the general law that such was the intention of the law-making body." The question is whether by the act of 1931 the Legislature intended to repeal those sections in the charter of the city of Charlotte under which the defendants acted in fixing the salaries of the teachers and in levying the tax for schools.

The trend of judicial thought is not favorable to repeal by implication. A statute should not be abrogated "by any constrained construction out of the general and ambiguous words of a subsequent act." *Bunch v. Comrs.,* 159 N. C., 335. As a rule apparent inconsistencies in the phraseology of statutes should be reconciled so as to make all effective, if possible. *Bramham v. Durham, supra.* Of course if a later is so repugnant to a prior act that the two cannot be reconciled the later act prevails; but in the statutes now under consideration we find no irreconcilable inconsistency.

The appellants insist that the act of 1931 applies to all public schools in the State, including those in the city of Charlotte. This position is based in part upon sections requiring the State Board of Equalization to approve each county and city budget (sec. 3); demanding the enforcement of formulated rules (sec. 4); prescribing the method of making up the budget (sec. 6); establishing a salary schedule for teachers (sec. 12); and making various other provisions for the support of the public schools.

This act was intended primarily to give greater effect to the constitutional provision for the maintenance of the schools for a term of six months. The purpose is designated in the caption, and throughout the act the limitation is prominent. Section 5 makes it the duty of the county board of education in each county to originate the six-month budget, but subsection c providing that the extended term budget shall not be effective until approved by the county commissioners and the State Board of Equalization applies to "districts receiving State aid for the extended term"—obviously not to the budget of a county not receiving for the extended term any aid from the State. We find no evidence that the State has given the city any financial assistance for extending the term of its school. The requirement in section 3 that the county and city budget must be approved by the State Board has reference to funds "received from the State" and not to a fund to be raised, as in this case, by local taxation; and in section 12 the proviso referred to by the appellants is expressly restricted to the "operation of the six months school term."

So, likewise, as to the proviso in section 15. It must be considered, according to the general rule of construction, as explaining, qualifying, or restraining preceding matter, and not as an independent substantive enactment operating as a repeal of local statutes to which it bears no relation and to which it makes no reference. *Propst v. R. R.,* 139 N. C., 397.

A minute discussion of the statutes is not necessary. We have considered them from the several points of view suggested in the brief of the appellants and find no satisfactory cause for reversing the judgment.

Affirmed.

MRS. V. E. COLE v. R. A. GAITHER ET AL.

(Filed 22 November, 1933.)

Appeal and Error C d—

An order allowing an appeal *in forma pauperis* may not be signed by the clerk more than ten days after the expiration of the term of court at which the judgment was rendered.

APPEAL by plaintiff from *Cranmer, J.,* at April Term, 1933, of WAKE. Appeal dismissed.

This action was heard in the Superior Court on defendant's demurrer to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. The demurrer was sustained, and judgment dismissing the action was rendered on 29 April, 1933.

The plaintiff excepted to the judgment, and gave notice in open court of her appeal to the Supreme Court. She was required by the judge to file an appeal bond in the sum of $50.00. She failed to file the bond, and on 25 May, 1933, applied to the clerk of the Superior Court of Wake County for an order allowing her to appeal *in forma pauperis,* as authorized by statute. The clerk granted her application, and signed the order. The appeal was thereafter docketed in the Supreme Court.

James E. Shepherd for plaintiff.
Clyde A. Douglass and Joseph C. Douglass for defendants.

PER CURIAM. The order allowing the plaintiff in this action to appeal *in forma pauperis* from the judgment of the Superior Court to this Court, was signed by the clerk more than ten days after the expiration of the term of the Superior Court at which the judgment was rendered. The clerk was without authority to sign the order on 25 May, 1933, and the appeal must for that reason be dismissed. This Court is without jurisdiction to hear the appeal. *Powell v. Moore,* 204 N. C., 654, 169 S. E., 281; *S. v. Pike, ante,* 176.

Appeal dismissed.

PHILIP L. BROCKWELL v. WESTERN UNION TELEGRAPH AND CABLE COMPANY.

(Filed 13 December, 1933.)

1. **Malicious Prosecution B c—Testimony of conditions of jail held competent in action for malicious prosecution.**

In an action for malicious prosecution it is competent for plaintiff to testify, on the issue of damages, as to the condition of the jail wherein he was confined on defendant's warrant, when such testimony is confined to that issue and does not tend to show any neglect of legal duty by the jailer or persons in charge of the jail, such conditions being foreseeable by defendant.

2. **Principal and Agent C d: Malicious Prosecution A f—Evidence that defendant's agent acted within authority in causing arrest held sufficient.**

The evidence in this action for malicious prosecution tended to show that plaintiff was wired a certain sum of money by his brother and that through error of defendant's sending office, plaintiff was paid a sum in excess of the amount wired, that the manager of defendant's receiving office had plaintiff arrested without probable cause and with malice in an attempt to recover the amount paid plaintiff in excess of the amount wired. Defendant moved for nonsuit on the ground that there was no evidence that its manager of the receiving office was acting within the scope of his authority in causing the arrest of plaintiff: *Held*, defendant's motion of nonsuit was properly overruled, there being sufficient evidence that defendant's agent was acting within the scope of his authority. *Kelley v. Shoe Co.*, 190 N. C., 406, cited and applied.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1933, of WAKE. No error.

This is an action to recover damages, both compensatory and punitive, for the unlawful and wrongful arrest and imprisonment of the plaintiff. The action was begun on 10 September, 1931.

It is alleged in the complaint that on 3 October, 1930, the plaintiff was arrested and imprisoned in Johnson City, Tennessee, on a criminal warrant which was procured by the defendant without probable cause, and with malice, and that the action which was instituted by the issuance of said warrant was dismissed at the request of the defendant prior to the commencement of this action.

It is further alleged in the complaint that as the result of his unlawful and wrongful arrest and imprisonment, the plaintiff suffered injuries in both mind and body, for which he is entitled to recover of the defendant damages, both compensatory and punitive, in a large sum, to wit: $15,000.

All the allegations of the complaint which constitute the cause of action alleged therein, are denied in the answer filed by the defendant. The defendant specifically denies in its answer that it procured or authorized the issuance of the criminal warrant on which the plaintiff was arrested and imprisoned, as alleged in the complaint.

The issues submitted to the jury were answered as follows:

"1. Did the defendant cause the arrest and imprisonment of the plaintiff, as alleged in the complaint? Answer: Yes.

2. If so, was the arrest without probable cause? Answer: Yes.

3. If so, was the arrest and imprisonment malicious? Answer: Yes.

4. Did the defendant cause the plaintiff to be arrested for the unlawful purpose of forcing the plaintiff to return money to the defendant, and not for the purpose of vindicating the law? Answer: Yes.

5. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,000."

From judgment that plaintiff recover of the defendant the sum of $2,000, with interest and costs, the defendant appealed to the Supreme Court.

R. L. McMillan, C. A. Douglass, Wm. F. Belew and Wm. F. Monogan for plaintiff.

J. C. Little for defendant.

CONNOR, J. The plaintiff, Philip L. Brockwell, is a citizen of this State, and a resident of the city of Raleigh. He is a veteran of the World War, and was injured while in the military service of the United States. He is now 35 years of age, and from time to time, since the war, has been a patient in various hospitals maintained by the United States for the care and treatment of disabled veterans. He is well known in the city of Raleigh, where he owns an established business, and where he is generally regarded as a man of good character.

The evidence offered by the plaintiff at the trial of this action was sufficient to show the following facts:

On 3 October, 1930, the plaintiff was a patient in the National Soldiers Home, at Johnson City, in the State of Tennessee. He had been in said home, as a patient, since the 24th or the 25th of September, 1930. A few days prior to 3 October, 1930, the plaintiff had communicated with his brother, Edgar Brockwell, at Raleigh, N. C., by telegraph or telephone, and had requested his brother, who had charge of his business, during his absence from his home, to send him money. At that time, his brother had in his possession money which he had collected for the plaintiff. Having received no response from his brother, during the afternoon of Friday, 3 October, 1930, the plaintiff went to the office of the defendant, Western Union Telegraph and Cable Company, in Johnson City, and after a conversation with A. J. Bryant, the manager of said office, filed with the defendant a telegram addressed to his brother, at Raleigh, N. C., requesting his brother to send him money at Johnson City, Tennessee. No amount was named in the telegram, but on previous occasions, when the plaintiff had requested his brother to send him money, during his absence from home, his brother had sent him amounts varying from a few dollars to two hundred dollars. About two hours after he had filed the telegram with the defendant, to be transmitted to his brother, the plaintiff was notified that there was a telegram at the office of the defendant for him. He went at once to the said office, and was there informed by a clerk that the defendant had been directed by a telegram from its office at Raleigh, N. C., to pay to the plaintiff the sum of $108.00. The clerk hesitated to pay said sum to the plaintiff, without further identification, but upon being instructed by A. J. Bryant, the manager of the office, to pay said sum to the plaintiff, handed to the plaintiff defendant's check for $108.00, drawn on a bank in Atlanta, Ga., and payable to the order of the plaintiff. At the suggestion of A. J. Bryant, the manager of the office, the plaintiff endorsed the check, and upon its delivery to the said manager, received from him the sum of $108.00, in currency. This transaction occurred during the afternoon of Friday, 3 October, 1930.

Some time during the morning of Saturday, 4 October, 1930, A. J. Bryant, the manager of defendant's office at Johnson City, was informed by a message received from the office of the defendant at Raleigh, N. C., that a mistake had been made by a clerk in the office at Raleigh in preparing the telegram of the previous day, requesting the payment of money to the plaintiff by the defendant at Johnson City, Tennessee. The amount which the defendant was directed to pay to the plaintiff should have been three dollars, instead of one hundred and eight dollars. A. J. Bryant, the manager of defendant's office at Johnson City, was requested by the defendant's office at Raleigh, to notify the plaintiff of the error and to demand of him the return of the sum of $105.00. A. J. Bryant was further notified by the Raleigh office, that if he failed to get the money from the plaintiff, the clerk in the Raleigh office, who had made the mistake, would be required to pay said sum to the defendant, and that if she should fail to do so, she would be discharged by the defendant.

Upon his receipt of the message from the Raleigh office, advising him of the error in the telegram of the previous day, A. J. Bryant at once began a search for the plaintiff, but could not find him on Saturday.

Early Sunday night the plaintiff was informed that his brother, Edgar Brockwell, had requested by telephone, that plaintiff call him at Raleigh, N. C. In consequence of this request, the plaintiff went to a hotel in Johnson City and put in a call for his brother at Raleigh. While plaintiff was in the hotel, waiting to talk with his brother over the telephone, A. J. Bryant, accompanied by a constable, came into the hotel, and at once pointed to the plaintiff, saying to the constable, "That is the man." The constable, in the presence of A. J. Bryant, demanded that plaintiff return to A. J. Bryant, the manager of defendant's office at Johnson City, the sum of $105.00. This demand was accompanied by a threat that if plaintiff did not return the money to A. J. Bryant, the constable would arrest him for embezzlement. A. J. Bryant then explained the situation to the plaintiff who declined to return the money until he could ascertain from his brother at Raleigh, whether or not a mistake had been made in the office of the defendant at Raleigh, as contended by the defendant. Plaintiff told the constable and A. J. Bryant that he would comply with their demand, if his brother told him that a mistake had been made by the defendant. Within a short time, the plaintiff talked to his brother at Raleigh, and was informed by him that a mistake had been made in the Raleigh office, and that he should refund to the defendant the sum of $105.00. The plaintiff then told the constable and A. J. Bryant that he had spent all of the money paid to him by the defendant on Friday afternoon, except the sum of $90.00, and that this amount was on deposit with the Postal Savings Department of the post office at the National Soldiers Home. The plaintiff then delivered the certificates for said deposit to the constable, saying that he would go with him to the post office the next morning, get the money, and refund it to the defendant. The constable took the certificates, and immediately arrested the plaintiff under a warrant which was dated 4 October, 1930, and was issued on an affidavit signed by A. J. Bryant. In this affidavit, the money which it was alleged had been paid to the plaintiff by mistake and which plaintiff had fraudulently refused to return, was described as the property of the Western Union Telegraph and Cable Company. After his arrest by the constable in the presence of A. J. Bryant, the plaintiff was taken by the constable to the jail in Johnson City, where he was confined until the next morning. A. J. Bryant did not go to the jail with the constable, but remained in the hotel. The next morning the plaintiff was taken by the constable to the post office at the National Soldiers Home where the money was paid to the constable, who thereupon discharged the plaintiff from custody. The warrant was subsequently marked, "Settled, received my costs." The money was paid by the constable to A. J. Bryant, the manager of the defendant's office at Johnson City, Tennessee.

The plaintiff was confined during the night of Sunday, 5 October, 1930, in the jail at Johnson City, and as the result of his confinement and of the conditions in the jail, he suffered injuries, both mental and physical. He was deeply humiliated by his confinement. There was no heat in the jail and he contracted a deep cold, and was threatened with pneumonia. The plaintiff testified that he was worried over being locked up in the jail. He requested the jailer to let him communicate with relatives and friends. His request was denied. The next morning when he was taken from the jail by the constable he was "all to pieces, nervous and trembling." He had spent a sleepless night, lying on a cement floor, surrounded by prisoners who were drunk and filthy.

The evidence offered by the defendant tended to show that A. J. Bryant, who had signed the affidavit, on which the warrant was issued, was not present when the plaintiff was arrested by the constable; that after the plaintiff had agreed to return the money the next morning, and had delivered the certificates, showing that the money was on deposit with the Postal Savings Department of the post office, at the National Soldiers Home, A. J. Bryant left the hotel, first saying to the constable, "That is all we want. Let Mr. Brockwell go."

The only assignments of error on defendant's appeal to this Court are (1) that the trial court overruled its objection to the testimony of the plaintiff with respect to the conditions in the jail, while he was confined there during Sunday night; and (2) that the trial court refused to allow its motion, at the close of all the evidence for judgment as of nonsuit. Neither of these assignments of error can be sustained.

The testimony of the plaintiff with respect to the conditions in the jail in which he was confined, was competent as evidence tending to show the cause of the injuries, both mental and physical, which he suffered as the result of his arrest and imprisonment, and the extent of such injuries. There was no testimony tending to show that these conditions were caused by the failure of the jailer, or of any person or persons in charge of the jail, while the plaintiff was confined therein, to perform any duty imposed by law with respect to said jail, or with respect to the plaintiff, as a prisoner therein. The conditions as shown by the evidence were such as the person or persons who caused the arrest and imprisonment of the plaintiff in said jail could well have foreseen. This evidence was competent on the issue as to damages, and was submitted by the court to the jury under proper instructions, as pertinent to that issue only. 11 R. C. L., p. 820. See *Seidler v. Burns* (Conn.), 79 Atl., 53, 33 L. R. A. (N. S.), 291, and note. While there are decisions to the contrary, the weight of authority is said to sustain the competency of evidence in actions to recover damages for malicious prosecution tending to show the conditions in the jail, where the plaintiff was imprisoned, as the result of his malicious prosecution by the defendant.

The evidence offered by the plaintiff in the instant case was amply sufficient to show that his arrest and imprisonment on the warrant procured by A. J. Bryant, without probable cause, and with malice, was unlawful and wrongful. This is not controverted by the defendant, although the evidence offered by the defendant tended to show the contrary. The defendant contends, however, that there was no evidence at the trial of the action tending to show its liability to the plaintiff for the unlawful and wrongful conduct of A. J. Bryant, the manager of its office at Johnson City, in procuring the warrant and causing the arrest and imprisonment of the plaintiff, for that such conduct was not within the scope of his employment by the defendant. This contention cannot be sustained.

The instant case is controlled by *Kelley v. Shoe Co.,* 190 N. C., 406, 130 S. E., 32, and not by *Lamm v. Charles Stores Co.,* 201 N. C., 134, 159 S. E., 444. In the opinion in each of these cases, the difficulty in drawing the line satisfactorily between cases in which there is evidence tending to show that the act of an employee was within the scope of his employment, and cases in which there is no evidence to that effect, is commented on. Without undertaking to distinguish these cases, and other cases relied upon by the parties to this action, respectively, we are of opinion that there was such evidence at the trial of this action, and that for that reason there was no error in overruling defendant's motion for judgment as of nonsuit. All the evidence, both that offered by the plaintiff and that offered by the defendant, was submitted to the jury under instructions to which there was no exception. The judgment is affirmed.

No error.

MARTHA J. ALDRIDGE, WIDOW, v. C. H. DIXON, RECEIVER OF THE FIRST NATIONAL BANK OF DURHAM, N. C.; NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, W. P. HARDY, MORTGAGEE, GEORGE E. SUTTON AND CLAUDE ALDRIDGE, PARTNERS, TRADING AS LENOIR HARDWARE COMPANY, MOLLIE DAWSON ALDRIDGE, WIDOW OF G. T. ALDRIDGE, DECEASED; HARRY ALDRIDGE, KATHLEEN ALDRIDGE AND G. T. ALDRIDGE, JR., THE LAST THREE NAMED BEING MINORS OF THE AGES OF SEVENTEEN YEARS, FOURTEEN YEARS, AND FOUR MONTHS, RESPECTIVELY; AND W. C. DOUGLASS, GUARDIAN AD LITEM FOR SAID INFANT DEFENDANTS, HARRY ALDRIDGE, KATHLEEN ALDRIDGE AND G. T. ALDRIDGE, JR.

(Filed 13 December, 1933.)

1. **Limitation of Actions B a—Action against land to enforce decree for owelty accrues from date of judgment.**

Where a petition in partition is filed, and the petitioners enter into possession of their respective shares, in accordance with the judgment of partition therein entered, and it is therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum is made a lien upon the lands, an action by the widow to enforce her claim against the land is barred after the lapse of more than ten years from the partition and decree of owelty, C. S., 445, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, does not alter this result.

2. **Appeal and Error E g—**

The record on appeal imports verity.

3. **Appeal and Error J g—**

Where plaintiff's cause of action is barred by the statute of limitations set up by defendant, other defenses interposed by defendant need not be considered.

APPEAL by plaintiff from *Harris, J.*, at June Term, 1933, of LENOIR. No error.

An agreed statement of case on appeal, in part, is as follows: "This action was instituted by the plaintiff for the purpose of enforcing a lien claimed by her against the land described in the complaint by virtue of an award to her in lieu of dower and made a charge upon the land described in the complaint. Under a petition for partition filed in November, 1920, *and a subsequent and similar petition for partition* filed in 1925, and under a report of commissioners and judgment of partition and decree of confirmation in said proceeding, the plaintiff was awarded an annuity in lieu of dower of $100.00 per year so long as she should live, against the land described in the complaint, the plaintiff claiming that nothing had ever been paid to her on account thereof, and that the lands should be subjected to the payment thereof, and that her lien was a first lien against the same. The contentions of the parties sufficiently appear from the pleadings, which are set forth in full in the record," etc.

The reason for the *subsequent and similar* petition for partition, filed in 1925, was: "That on account of the fact that a part of the records in the foregoing proceeding had been destroyed by fire." In regard to the "foregoing proceeding" the record discloses "that the report of said commissioners was duly confirmed, but the said report of said commissioners and the decree of confirmation thereof were never recorded, but were carried to the office of Moore & Croom in the building in Kinston, known as the Hunter Building, which was burned and the said report of commissioners and confirmation thereof were destroyed."

The record also discloses that "said commissioners being the same commissioners theretofore appointed under the said former proceeding, and a new report was filed by said commissioners, showing their division of said lands made during the year of 1920, and the allotment of an annuity to the said Martha J. Aldridge against each of the tracts of land allotted to the several tenants in common in lieu of dower."

The defendants set up four material defenses: "(1) The 3, 7 and 10-year statutes of limitation; (2) The failure of the clerk to cross-index the charge against the land; (3) The plaintiff 'agreed and did relinquish and waive any right or interest which she had, or might hereafter acquire, in and to the land described in the complaint, which agreement is pleaded in bar of the plaintiff's right to recover.' (4) The execution of a deed of trust from G. T. Aldridge and wife to W. H. Allen, trustee for Martha J. Aldridge, to secure the sum of $1,083.15, which defendants allege was given in satisfaction and release of any past or future indebtedness 'created by reason of the charge referred to in the complaint against the tract of land allotted to G. T. Aldridge.' "

In the answer C. H. Dixon, receiver of First National Bank of Durham, N. C., trustee for the Joint Stock Land Bank of Durham, who claimed priority of lien over plaintiff by deed in trust made by G. T. Aldridge and wife Mollie Dawson Aldridge, to secure $1,500, recorded 31 July, 1926, Book 91, page 238, registry for Lenoir County, N. C., is the following: "That if the plaintiff had any cause of action against these defendants, which is specifically denied, then the said cause of action accrued more than ten years prior to the institution of this action; and the ten-year statute of limitations, as provided by C. S., 445, and other provisions of the statutes, is hereby specifically pleaded in bar of the right of the plaintiff to recover against these defendants, or to charge said land as prayed for."

The following judgment was rendered in the court below: "This cause coming on to be heard, and being heard at this the June Term, Superior Court of Lenoir County, before his Honor, W. C. Harris, judge, and the court being of the opinion at the close of plaintiff's evidence that she is not entitled to recover: It is now, therefore, upon motion of counsel for the defendants, considered, ordered and adjudged that this action be and the same is hereby dismissed as of nonsuit and that the plaintiff pay the costs to be taxed by the clerk."

Plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary one and relevant facts will be considered in the opinion.

Dortch & Smith and Wallace & White for plaintiff.
Langston, Allen & Taylor for defendants.

CLARKSON, J. For a decision of this action we think it necessary to consider only one aspect of this controversy: Was plaintiff's action barred by the ten-year statute of limitations, C. S., 445? We think so.

In *Moore v. Charlotte,* 204 N. C., 37 (39), is the following: "Where the defendant properly pleads a statute of limitations the burden is on the plaintiff to show that the action was brought within the time limit fixed by the statute pleaded, or in other words it is not barred by the statute that is pleaded. *Tillery v. Lumber Co.,* 172 N. C., 296; *Marks v. McLeod,* 203 N. C., at p. 258-9." *Wilkes County v. Forester,* 204 N. C., 163 (165); *Drinkwater v. Tel. Co.,* 204 N. C., 224.

The plaintiff in her brief says: "The right of the plaintiff to enforce her lien upon the land is barred only in ten years from the signing of the decree of confirmation, and the decree of confirmation was signed in 1925, and this action was instituted in August, 1932. Therefore, the defendants' plea of the ten-year statute avails them nothing. It may be contended by the defendants and it was so argued by them in the court below, that the charge which plaintiff seeks to enforce is a charge of owelty of partition. Even if the court should so construe this charge it is enforceable as such at any time within ten years after the signing of the decree of confirmation. McIntosh, sec. 940, p. 1065; *Ex Parte Smith,* 134 N. C., 495; *Herman v. Watts,* 107 N. C., 649."

We set forth what this Court said in *Smith, Ex Parte, supra,* at p. 500-1: "We cannot see why the statute should not apply. It is true the charge rests upon the land alone, and it has been said that the land is the debtor and that there is no personal liability of its owner. But how can this affect the question one way or another. The statute, whether of presumptions or limitations, operates against the actor or the party who must seek to apply the remedy and it affects only the remedy. If, therefore, he who has the right to enforce the charge against the land delays in doing so for the time limited by the statute, the bar operates without regard to the particular nature of the charge or lien which is to be enforced or even to the form of the remedy. It is a familiar principle that the statute of limitations affects not the right but the remedy. Besides, so far as the nature of the lien or charge is concerned, if we consider the matter with reference to that alone and without regard to the remedy, the case comes not only within the spirit but within the letter of the statute, which decree shall be barred if it is not brought within ten years from the date of the rendition of the same." *Lilly v. West,* 97 N. C., 276 (279); *McLeod v. Williams,* 122 N. C., 451; *Bank v. Swink,* 129 N. C., 255; *Hyman v. Jones, ante,* 266.

The plaintiff testified, in part: "After the division of the land under the petition recorded 15 December, 1920, and recorded in orders and decrees, K, pages 16 to 19, each one of the children went into possession of his respective share of land under said petition, that is, all that were of age. . . . My son, G. T. Aldridge, went into possession of his share allotted to him in the fall of 1920, right after it was divided. He remained in possession until 1931, when he died."

The plaintiff contends that: "The defendants, in pleading the ten-year statute, evidently overlooked the fact that the only decree on record confirming the division was rendered in 1925, from which time the statute would begin to run."

In answer, the defendants in their brief say: "It is apparent, therefore, that counsel for the plaintiff have switched their position considerably since the trial of this cause as will appear from their brief in that they now take the position that the proceeding under which they claim was begun in 1925. They undoubtedly see that if their first position was insisted upon that the statute of limitation bars their claim for more than ten years has elapsed since the first order of confirmation. The second proceeding referred to in 1925, as will appear from the complaint, was simply in the nature of reinstating and supplying the lost papers for the purpose of recording same."

The summons in this action was issued 15 August, 1932. The record discloses that the petition for partition was filed in November, 1920, and plaintiff testified that G. T. Aldridge went into possession of his share allotted to him in the fall of 1920, right after it was divided. The record also discloses "showing their division of said lands made during the year 1920."

We are bound by the record, it imports verity and we cannot go behind it. "The Supreme Court, on appeal, is bound by the record." *Higgs-Taft Furniture Co. v. Clark,* 191 N. C., 369; *Fochtman v. Greer,* 194 N. C., 674.

It is a serious question if the other defenses set up by defendant are not also available, but we need not consider them, as the defense of the statute of limitation bars plaintiff's right to recovery. In law we see

No error.

PATE HOTEL COMPANY v. JOHN MORRIS ET AL.

(Filed 13 December, 1933.)

1. **Municipal Corporations K e—Taxpayers of town are bound by judgment that mandamus issue to compel levy of taxes to pay town obligation.**

   In the absence of fraud or mistake, the taxpayers of a municipality are bound by a judgment duly obtained against the municipality for municipal improvements and by judgment that mandamus issue to compel the municipal governing body to levy a tax sufficient to pay the judgment, the municipality representing its taxpayers in such suit although they are not *eo nomine* named therein.

2. **Taxation A b: Constitutional Law I a—Federal Due-Process Clause does not prescribe State taxation in absence of arbitrary action.**

   As a rule the State determines its own policy in matters of taxation, the courts intervening on an asserted violation of the due-process clause of the Federal Constitution only when the action of the State or its governmental subdivisions is arbitrary, and in this case the tax levy by defendant municipality is upheld, there being no evidence of any arbitrary action.

APPEAL by plaintiff from judgment of *Sinclair, J.,* rendered at Chambers on 19 May, 1933, vacating an order restraining the collection of taxes levied against the property of the plaintiff as a part of the municipal taxes of the town of Carolina Beach. From NEW HANOVER.

The plaintiff brought suit against the tax collector of Carolina Beach and against the auditor of New Hanover County, who was the acting treasurer of Carolina Beach, to restrain a levy upon the plaintiff's personal property for the collection of taxes due by the plaintiff. The levy of $3.00 on property valued at $100 was composed of a tax of $1.00 for general purposes and $2.00 as required by a writ of mandamus.

Carolina Beach is a municipal corporation created and organized by virtue of chapter 117, Private Laws, 1925; and the plaintiff and Carolina Beach Corporation are bodies politic organized under the laws of North Carolina.

In 1926 and 1927 Carolina Beach Corporation entered into an agreement with the municipal corporation to construct at Carolina Beach a power line, streets, waterworks, and other improvements, of which the town was to pay $15,000 and was to issue its three notes or bonds in the sum of $5,000, each dated 26 March, 1927, payable one year after date. The town of Carolina Beach issued these bonds each in the following form:

"$5,000. Carolina Beach, N. C., 26 March, 1927.

For value received, one year after date, the town of Carolina Beach promises to pay to the order of the Carolina Beach Corporation the sum of five thousand dollars, with interest thereon from date till paid, at the rate of six per cent per annum, interest due and payable semi-annually. This note is one of three notes totaling fifteen thousand dollars and has been executed upon the passage of proper resolution by the board of commissioners of the town of Carolina Beach on this date, and is secured by deed of trust of this date securing the balance of purchase money for waterworks plant and equipment, lot of land on which same is situated and improvements at Carolina Beach."

The Realty Bond Company purchased the bonds for value before maturity.

The town defaulted and refused to pay any part of the principal or interest of the bonds, in consequence of which the Realty Bond Company brought suit and at February Term, 1930, recovered a judgment against the town for $14,338.35 with interest from 2 February, 1929, and costs. The town failed to pay the judgment and in July, 1931, the Realty Bond Company filed a petition in the cause for a writ of mandamus to compel the levy of a property tax and the court gave judgment, commanding and requiring the town to levy a tax for the tax year of 1932 upon the real and personal property situated in the town sufficient to pay one-third of said sum with interest and costs, and to levy for the tax years 1933 and 1934 a like amount for such purpose, the rate to be fixed by the commissioners upon the basis of the tax valuation of the real and personal property in the town after making proper allowance for the cost of collection and the loss from noncollection, and to pay the judgment out of the funds derived from the collection of taxes during the three respective years.

On 24 April, 1933, plaintiff instituted this action to restrain the collection of the tax provided for by the writ of mandamus on the ground that such tax is exorbitant and confiscatory. The Realty Bond Company intervened and filed an answer to the complaint. Judge Sinclair dissolved the restraining order, stayed execution pending the appeal, and adjudged that the writ of mandamus should not be disturbed or in any way modified and that the duties of the defendants or the commissioners of the town, as provided in the decree, should not be changed or relaxed except as the judgment affects the plaintiff. The plaintiff excepted to the judgment and appealed.

Thomas W. Ruffin for plaintiff.
George Rountree and J. O. Carr for intervener.

ADAMS, J. The appeal brings up the single question whether the writ of mandamus commands the levy of a tax which deprives the plaintiff of his property without due process of law.

The judgment commanding the levy is final. The defendants had opportunity to set up by way of defense all that is alleged in the complaint of the Pate Hotel Company, the present plaintiff, and from an adverse judgment they declined to prosecute an appeal. The Realty Bond Company takes the position that the questions presented in this appeal have previously been adjudicated in litigation between itself and the town of Carolina Beach, and that the plaintiff, a taxpayer of the town, is bound by the judgment determining the rights of the respective parties.

It is an established principle that a county, municipality, or other governmental body is for certain purposes a representative of its citizens and taxpayers. The relation between them is analogous to that between a trustee and his *cestui que trust;* and a judgment against such governmental body in a matter of interest general to all its citizens is binding upon the latter although they are not *eo nomine* parties to the suit. *Sauls v. Freeman,* 12 A. S. R., 190; *Ashton v. City of Rochester,* 28 A. S. R., 619.

In Freeman on Judgments (5 ed.), sec. 507, it is said: "A judgment for a sum of money against a municipal corporation imposes an obligation upon its citizens which they are compelled to discharge. Every taxpayer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for its payment, the municipal officers levy and endeavor to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment, nor relitigate any of the questions which were or which could have been litigated in the original action."

Approving this statement of the law this Court has held that if a governmental body fails to avail itself of legal defenses, taxpayers will be concluded by the judgment, the only exception being the commission of a mistake or the perpetration of a fraud. *Bear v. Commissioners,* 122 N. C., 434. The reversal of the decision in that case upon a petition for a rehearing did not modify or affect the principle under consideration as enunciated by the court. The petition was allowed because the plaintiff, having failed to plead his judgments in estoppel of the matters pleaded in the answer or to demur to the answer, waived his rights, and by his agreement to a finding of facts by the court, went to the hearing on the merits of the consideration upon which the judgments were granted. This appears in the opinion. *Bear v. Commissioners,* 124 N. C., 204.

The fact that the principle was not affected by setting aside the judgment given in the first appeal definitely appears in later cases. *In re Utilities Company,* 179 N. C., 151, 164, the Court adhered to its previous conclusion that a municipal corporation is the legal representative of its inhabitants and taxpayers with respect to all matters properly within its jurisdiction and in *Eaton v. Graded School,* 184 N. C., 471, repeated the observation that a municipal corporation acting in its official capacity represents citizens and taxpayers within its corporate boundaries.

The plaintiff is concluded by the judgment awarding the writ of mandamus and cannot attack it on the grounds set forth in its complaint. Indeed, even if the plaintiff were not thus concluded its collateral attack of the judgment would be unavailing. *Young v. Henderson,* 76 N. C., 420.

The record discloses no substantial ground for the contention that the judgment complained of deprives the plaintiff of its property without due process of law. As a rule the State determines its own policy in matters of taxation and the Federal Government is not charged with the duty of supervising State action. It is only when the action of the State authorities is found to be arbitrary that the courts interfere with assessments on the asserted violation of the due process clause. *Embree v. Kansas City, etc.,* 240 U. S., 242, 60 L. Ed., 624; *Hancock v. Muskogee,* 250 U. S., 454, 63 L. Ed., 1081; *Goldsmith v. Pendergrast Construction Co.,* 252 U. S., 12, 64 L. Ed., 427. We have discovered no indication of arbitrary action on the part of the court or the State authorities.

We find it unnecessary to consider other phases of the question which are referred to in the brief of the appellee. Judgment

Affirmed.

IN THE MATTER OF FORECLOSURE UNDER DEED OF TRUST MADE BY H. E. LONGLEY TO CAROLINA MORTGAGE COMPANY, TRUSTEE, DATED 15 JUNE, 1927, RECORDED IN BOOK 183, PAGE 165, IN THE OFFICE OF THE REGISTER OF DEEDS, NEW HANOVER COUNTY, N. C., THE NOTE THEREBY SECURED HAVING BEEN ASSUMED BY W. L. SCRUGGS AND WIFE, AND MRS. LIZZIE W. BROADFOOT.

(Filed 13 December, 1933.)

1. **Appeal and Error E g—**

   The record on appeal imports verity.

2. **Husband and Wife D b—Husband has no right to rents from wife's land and may not be held responsible therefor by third person.**

   Where lands belonging to the separate estate of a wife have been foreclosed under a deed of trust thereon duly executed, and after such foreclosure the rents from the land are paid to the wife, the husband may not be held responsible for such rents by the person entitled to the rent by virtue of the foreclosure, since, under our Constitution, Art. X, sec. 6, a wife is given sole ownership of her separate estate.

3. **Contempt of Court A b—An order of the court which is void ab initio may not be made the basis for contempt proceedings.**

   Where lands belonging to the separate estate of a wife are foreclosed under a duly executed deed of trust thereon, and rents are paid the wife after such foreclosure, an order issued upon motion of the person entitled to the rents by virtue of the foreclosure that the husband should pay into court the rents thus collected by the wife is void *ab initio*, and the husband may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one "lawfully issued." C. S., 978.

APPEAL by W. G. Broadfoot from *Cranmer, J.*, at July Term, 1933, of NEW HANOVER. Reversed.

N. C. Code of 1931 (Michie), sec. 2591, sets forth the method for the sale of land by trustees, mortgagees, etc. A contempt proceeding was instituted against W. G. Broadfoot growing out of noncompliance with his bid. The clerk dismissed the contempt proceeding, but the order said: "Upon payment to trustee (movant) of all rents collected on said property from 1 January, 1933, to 31 May, 1933."

On appeal to the Superior Court, the judgment in that court states: "Upon appeal the foregoing order of the clerk is hereby in all respects affirmed."

The clerk gave notice to appellant "why you should not be adjudged in contempt of court for your failure to comply with the judgment rendered in this cause," etc. In answer appellant W. G. Broadfoot states that he has neither collected nor received any rents from said property from 1 January, 1933, to 31 May, 1933, and, therefore, has no rents to account for or to pay over as in said order provided.

The clerk made the following order: "And it appearing further that said W. G. Broadfoot has collected no rent from the property referred to in this proceeding, from 1 January, 1933, until 31 May, 1933, and, therefore, has no rent payments to account for as provided in the order heretofore entered in this cause. And it is now ordered and adjudged that the said W. G. Broadfoot has fully complied with the order heretofore entered by the undersigned, clerk of the Superior Court of New Hanover County and approved by the Honorable W. A. Devin, judge presiding, and this proceeding is hereby dismissed."

The record discloses: "That thereafter, on 22 June, 1933, the clerk of the Superior Court signed the following judgment: '6/22/33 W. G. Broadfoot not having complied with above order is hereby found guilty of contempt of court upon the grounds that either he or Mrs. Lizzie W. Broadfoot, according to statements filed by two real estate agents, have collected certain amounts of rents and applied same to the account of Mrs. Lizzie W. Broadfoot, the wife of W. G. Broadfoot. No further testimony was taken at this hearing, after delivery to the clerk of statements of parties handling the property, which statements are hereto attached and constitute testimony on which this order is based."

W. G. Broadfoot excepted and appealed to the Superior Court. The court below in its judgment stated: "And it appearing that the clerk did not have jurisdiction to make this order of 22 June, 1933, adjudging the said W. G. Broadfoot in contempt, the said order is overruled."

The judgment further gives an itemized statement of rents, and it is the following: "Net amount paid Mrs. Broadfoot—$96.50. It is now, on motion of C. M. Symmes, attorney for movant: Considered, ordered and adjudged that the said W. G. Broadfoot pay to C. M. Symmes, attorney for the movant, the sum of $96.50, representing rents collected on the property involved for the five months period from 1 January, to 31 May, 1933, in accordance with the order of Judge Devin, hereinbefore mentioned, within ten days from this date. This 25 July, 1933."

The respondent, W. G. Broadfoot excepted and assigned error to the judgment as rendered and appealed to the Supreme Court.

C. M. Symmes for appellee.
K. O. Burgwyn for respondent, appellant.

CLARKSON, J. The question involved: The appellant raised the bid within ten days after the sale under foreclosure. The property was resold, was knocked down to him at the advanced bid. He failed to pay the purchase price and was attached for contempt of court. Under subsequent proceedings he was exonerated of contempt of court but required by an order of court to pay a certain sum alleged to have been collected as rent on the premises during the proceedings. The appellant filed response alleging that he had collected no rent from the property during the period and an order was signed by the clerk finding that to be a fact. Under subsequent appeal to the judge of the Superior Court a judgment was signed requiring the appellant within ten days to pay into court the sum of $96.50, which the record shows was rent collected by his wife and not by him. The property involved which was foreclosed having been the separate estate of the wife. Query: Was such judgment valid? We think not.

The record to this Court imports verity and we cannot go behind it. The record discloses that the property was owned by Mrs. Broadfoot and the judgment discloses that the rent was paid to her by the rental agents—"net amount paid Mrs. Broadfoot $96.50."

We have not been furnished any authority by appellee in this Court in which a husband could collect his wife's rents and keep them, or be responsible for them to any other person. N. C. Const., Art. X, sec. 6, is as follows: "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried."

"There is no 'beneficent provision of the Constitution' which throws additional shackles around women in the management of their separate property. The provision of the Constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from most of the restrictions formerly existing." *Strouse v. Cohen,* 113 N. C., 349-353. "The Constitution was evidently intended to emancipate married women and place them, so far as property rights are concerned, on a par with men and *femes sole.*" *McLeod v. Williams,* 122 N. C., 451, 454. The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by this section giving the wife the sole ownership of her separate estate. *Turlington v. Lucas,* 186 N. C., 283.

The appellant in his brief says: "The proceeding in its entirety, so far as we have been able to determine, is without a parallel and without precedent, consequently, a diligent search has failed to disclose any authority from this or other jurisdictions upon the question."

In answer the appellee says that the judgment of the Superior Court, ordering appellant to pay these rents, was not appealed from and the matter is concluded. The clerk had absolutely no power under the statute, N. C. Code of 1931, sec. 2591, to attach appellant under the admitted facts in this case for contempt and further to force him to take his wife's rents, which in law he had no control over.

Section 978 is as follows: "Any person guilty of any of the following acts may be punished for contempt: (4) Wilful disobedience of any process or order lawfully issued by the court." The contempt proceedings was not an order "lawfully issued" under the facts and circumstances of this case. The proceeding is void *ab initio.* The judgment is

Reversed.

G. D. B. REYNOLDS v. G. C. MORTON.

(Filed 13 December, 1933.)

1. **Reference A a—Mere denial of the duration and terms of an alleged trust is not plea in bar of reference of suit by the court.**

A suit to declare a trust in lands and for an accounting upon allegations of an agreement between the parties that defendant should purchase the property owned by plaintiff upon the foreclosure of the second deed of trust thereon and use the rents and profits therefrom after paying the expenses of operation to pay and discharge the note secured by a first deed of trust on which defendant was an endorser, and then reconvey the lands to plaintiff or some person designated by him is held subject to reference by the court on its own motion, C. S., 573(5), and defendant's answer denying the trust and other material allegations of the complaint is not such a plea in bar as to entitle defendant to a determination of the plea before reference, defendant not having denied the acquisition of the legal title by him.

2. **Trusts A a—**

Jurisdiction to enforce a trust arises where property is accepted on terms of using or holding it for the benefit of another, and it is not necessary that the terms of the trust be made in writing at the time legal title is conveyed.

3. **Reference A a—**

A plea in bar of a reference is not conclusive unless it extends to the whole cause of action so as to defeat it absolutely and entirely.

APPEAL by defendant from *Harding, J.,* at May Term, 1933, of STANLY. Affirmed.

Civil action to establish a trust in real property and to compel an accounting.

It is alleged that the plaintiff owned 2,000 acres of land on which there was a peach orchard stocked with about 21,000 trees; that the property was subject to two deeds of trust, the first securing a debt in excess of $17,500 to the Greensboro Joint Stock Land Bank and the second an indebtedness held by S. Carter Williams, trustee; that the plaintiff and the defendant entered into an agreement by which the land should be sold by Williams, trustee, subject to the first deed of trust, and should be purchased by the defendant upon the following trusts: he was to take charge of the orchard, market the crops, pay the expenses (including his salary), the taxes, the installments due on the first deed of trust, an indebtedness on which the defendant and others were obligated as endorsers for the plaintiff, and pay the net proceeds to the plaintiff; also that the defendant, after the liquidation of the indebtedness, should reconvey the land to the plaintiff or to such person as the plaintiff should designate. It is further alleged that the defendant received the proceeds of the crops for 1929, 1930, 1931; that the proceeds in 1929 and 1930 were sufficient to pay the expense of operation, the installments due under the first deed of trust, and considerably to reduce the amount of the endorsers' obligation; and that the defendant has made conveyance of the land in breach of his trust and has never accounted for the funds coming into his hands pursuant to his trust.

The defendant filed an answer denying the trust and other material allegations in the complaint and put in issue the question of his liability to the plaintiff.

After inspection of the pleadings, records, and affidavits the court ordered that the cause be referred to a referee to take evidence, find facts, state his conclusions of law, and make report to the court. The defendant excepted and appealed.

Vann & Milliken, Hartsell & Hartsell, F. D. Phillips, Morton & Smith, and Brown & Brown for appellant.

Varser, Lawrence, McIntyre & Henry, and R. L. Smith for appellee.

ADAMS, J. Upon the application of either party or of its own motion, the court may direct a reference . . . "where the issues of fact and questions of fact arise in an action of which the courts of equity of the State had exclusive jurisdiction prior to the adoption of the Constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred dollars." C. S., 573 (5). In this case the court, of its own motion, ordered a reference under this section and appointed a referee. The defendant excepted on the ground that he had filed a plea in bar, which should be heard and determined before the cause was referred. Of course, according to the general rule, a plea in bar must first be determined (*Duckworth v. Duckworth,* 144 N. C., 620); but the preliminary question is whether the defendant's mere denial of the plaintiff's cause of action is such a plea as will bar the reference, conceding without deciding that a plea in bar is applicable to actions formerly cognizable only in courts of equity.

The record contains excerpts from the defendant's affidavit and examination from which it may reasonably be inferred that the defendant took title to the land in the capacity of a trustee for the year 1929. If he did so, the trust relation existed and his limitation of the terms would not preclude the plaintiff from establishing his contention of the agreement. The jurisdiction to enforce the performance of trusts arises where property has been accepted by one person on terms of using or holding it for the benefit of another, and in this State it is not requisite that a declaration of trust be made in writing at the time the legal title is conveyed. *Shelton v. Shelton,* 58 N. C., 292; *Riggs v. Swann,* 59 N. C., 118; *Lefkowitz v. Silver,* 182 N. C., 339.

A plea in bar of a reference is not conclusive unless it extends to the whole cause of action so as to defeat "it absolutely and entirely." *Alley v. Rogers,* 170 N. C., 538; *Bank v. Evans,* 191 N. C., 535; *Bank v. McCormick,* 192 N. C., 42. If the defendant accepted the title to the property in trust, simple denial of the alleged cause of action would not necessarily operate as a plea in bar, the controversy between the parties as to the duration and terms of the trust not being effective to defeat the plaintiff's cause of action.

Judgment affirmed.

NORTH CAROLINA MORTGAGE CORPORATION v. T. W. WILSON ET AL.

(Filed 13 December, 1933.)

1. **Usury B b: Equity A b—Where party demands equitable relief he can enforce forfeiture only of interest in excess of legal rate.**

Where in a legal action the defendant, a borrower of money, seeks an equitable relief and alleges usury, it is required that he pay the principal sum due with the legal rate of interest, the only forfeiture which he can enforce being the interest in excess of the legal interest rate. C. S., 2306.

2. **Set-Off and Counterclaim B a: Ejectment A c — Counterclaim for usury may not be set up in action in ejectment.**

While a counterclaim for usury may be set up in an action on the note, such counterclaim may not be set up in an action in ejectment based on title to the property under foreclosure of the deed of trust securing the note.

APPEAL by defendant Wilson from *Oglesby, J.,* at May Term, 1933, of MECKLENBURG. No error.

The plaintiff brought ejectment against the defendant T. W. Wilson to recover possession of a lot in the city of Charlotte. Wilson filed an answer admitting the possession of the property and set up certain counterclaims, in which he pleaded: (1) fraud in the procurement of the deed of trust executed to the First National Bank of Durham; (2) damages as a result of an alleged refusal to render statements of the amount due on the defendant Wilson's notes; (3) forfeiture of interest on certain notes; and (4) a charge of usurious interest, including the penalty for interest paid. The plaintiff filed a reply denying each of the counterclaims, and at the close of the evidence the court dismissed the counterclaims as in case of nonsuit, and submitted the following issue, which was answered "Yes": "Is the plaintiff the owner of the property described in the complaint, and entitled to the immediate possession thereof?" Judgment for plaintiff; appeal by defendant Wilson.

John M. Robinson, J. M. Scarborough, and H. M. Jones for plaintiff.
Chase Brenizer and Robert B. Street for defendant Wilson.

ADAMS, J. Through the Charlotte Insurance and Investment Corporation the defendant Wilson procured a loan of $4,000, and on 15 October, 1928, he and his wife executed a deed of trust to the First National Bank of Durham, as trustee, to secure a long-term first mortgage note in the principal sum of $4,000, payable 12½ years after date, with interest at the rate of 6 per cent beginning two years after date, and eight short-term first mortgage notes, each in the sum of $60, due at stated periods, bearing no interest until after maturity. The notes were payable to bearer at the First National Bank in the city of Durham. In 1930 a receiver was appointed for the Home Mortgage Company, and in 1931 the receivership was dismissed. On 1 July, 1931, the North Carolina Mortgage Corporation was organized to protect those who held the bonds of the Home Mortgage Company, and at a foreclosure sale the plaintiff purchased the notes of the defendant Wilson. Up to 1 July, 1931, Wilson had paid $1,249, and after the plaintiff received the notes he made payments aggregating $177. The deed of trust was afterwards foreclosed and the plaintiff became the purchaser of the lot in controversy.

The plaintiff offered to allow Wilson to keep the lot upon payment of the sum he admitted to be due as principal, with legal interest, and the defendant declined the offer. The defendant Owens succeeded the First National Bank of Durham as trustee.

The plaintiff's action is at law. The defendant set up an alleged defense in equity. It is a familiar principle that a borrower of money who seeks equitable relief must himself deal equitably with his adversary by paying the principal and lawful interest. The only forfeiture he may enforce is the excess of the legal rate of interest. *Wilson v. Trust Co.,* 200 N. C., 788; *Edwards v. Spence,* 197 N. C., 495; *Miller v. Dunn,* 188 N. C., 397; *Adams v. Bank,* 187 N. C., 343. Moreover, there is no contention that the defendant paid usurious interest to the plaintiff. C. S., 2306; *Clark v. Bank,* 200 N. C., 635; *Jackson v. Bank,* 203 N. C., 357.

The statute provides that a counterclaim for usury may be set up in an action to recover upon the note; but this is an action to recover the possession of real property. The counterclaim is inopportune.

We find no sufficient basis of fraud; no refusal of the plaintiff to furnish a statement of the amount due; no error in the admission or rejection of evidence; no exception which calls for a new trial.

No error.

N. R. BULLARD v. G. R. ROSS.

(Filed 13 December, 1933.)

1. **Negligence D e: Trial G b—**

   Where the verdict of the jury establishes contributory negligence on the part of plaintiff, he may not recover damages assessed by the jury in his favor although the verdict also establishes negligence on the part of defendant.

2. **Damages C a—**

   In an action to recover for the negligent killing of plaintiff's mules evidence that the loss of the mules resulted in a partial loss of plaintiff's crops is properly excluded as being of remote and speculative or conjectural damages.

3. **Appeal and Error J e—**

   Where upon the verdict of the jury upon the merits of the case plaintiff is not entitled to recover, error, if any, in the exclusion of evidence of additional damages is immaterial.

4. **Negligence B d—**

   There may be concurrent proximate causes of injury.

APPEAL by plaintiff from *Sinclair, J.,* at February Term, 1933, of COLUMBUS. No error.

The plaintiff brought suit to recover damages caused by a collision of the defendant's truck with the plaintiff's wagon and mules on a public highway. The plaintiff offered evidence that his wagon was damaged, one of his mules killed and the other injured; the defendant contended that the wagon was driven at night without a light on the wrong side of the road. Each party insisted that the other was negligent. The jury returned the following verdict:

1. Was the plaintiff's personal property damaged by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff, by his own negligence, contribute to his damage, as alleged in the answer? Answer: "Yes."

3. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: "$250."

Judgment for defendant; exception and appeal by plaintiff.

Williamson & Bennett for plaintiff.
Powell & Lewis for defendant.

ADAMS, J. The affirmative answer to the second issue bars the plaintiff's recovery of damages. *Crane v. Carswell,* 203 N. C., 555; *Allen v. Yarborough,* 201 N. C., 568; *McKoy v. Craven,* 198 N. C., 780.

The plaintiff excepted to the exclusion of evidence tending to show that the death of one mule and the injury of the other resulted in the loss, or partial loss, of his crop. The proposed evidence, being remote and speculative or conjectural, was properly excluded. *Sledge v. Reid,* 73 N. C., 440. Besides, in view of his contributory negligence an increase in the assessment of damages would be of no benefit to the plaintiff.

We find no error in the instruction relating to the second issue. There may be concurrent proximate causes of an injury. *White v. Realty Co.,* 182 N. C., 536; *Harton v. Telephone Co.,* 141 N. C., 455.

No error.

CHARLTON E. MISSKELLEY v. HOME LIFE INSURANCE COMPANY.

(Filed 13 December, 1933.)

1. **Insurance R c—Conflicting evidence as to whether insured had disease causing disability prior to issuance of policy held for jury.**

Plaintiff brought suit on a disability clause in a policy of life insurance which provided for certain monthly payments if insured should become disabled by bodily injury occurring or disease originating after the issuance of the policy. Plaintiff testified that at the time of the issuance of the policy his eyesight was not impaired and that he was thoroughly examined by insurer's physician upon his application for the policy, and that no impairment or disease of his sight was disclosed by the physician's examination and test of his eyes, and that subsequent blindness had rendered him disabled. Defendant introduced testimony of an eye specialist that from his examination of plaintiff's eyes plaintiff was suffering from a chronic eye disease several years prior to the application for the policy, and moved for a nonsuit on the ground that the evidence showed that the disease resulting in plaintiff's disability originated prior to the issuance of the policy: *Held*, the evidence, viewed in the light most favorable to plaintiff, was sufficient to be submitted to the jury.

2. Appeal and Error A a—

The Supreme Court is confined to matters of law or legal inference upon appeal of a civil action. Art. IV, sec. 8.

3. Insurance M e—Denial of liability is a waiver of proof of disability.

Where an insurer denies liability under a disability clause in a life insurance policy on the ground that the alleged disability resulted from a disease originating prior to the issuance of the policy and therefore did not come within the terms of the disability clause, and that the disability was not total as defined by the policy, the insurer waives proof of disability.

4. Insurance R c—

The attending physician's statement as to insured's condition is not conclusive on the question of whether insured had become totally and permanently disabled within the provisions of the policy contract.

5. Same—Instruction defining total permanent disability held without error.

In an action on a disability clause in a policy of life insurance providing for the payment of a certain sum monthly to insured if he should become totally and presumably permanently disabled and thereby prevented from engaging in any occupation and performing any work for compensation and profit, an instruction that the question to be determined by the jury was whether insured "was prevented from working with reasonable continuity in his usual work or in such work as he is qualified physically and mentally under all the circumstances to do, substantially the reasonable and essential duties incident thereto" and that ability to do odd jobs of a comparatively trifling nature would not prevent recovery, is held to be without error.

6. Insurance M c—Proof of loss sufficient for recovery if established in court is sufficient.

It is not required that an insured should furnish proof of disability to the satisfaction of the insurer, but only that he should furnish such proof of disability as would entitle him to recover if established in court according to the rules of evidence.

APPEAL by defendant from *Cranmer, J.*, and a jury, at March Term, 1933, of WAKE. No error.

This was a civil action, instituted by Charlton E. Misskelley, plaintiff, against Home Life Insurance Company, defendant, to establish the liability of defendant for certain benefits in the nature of stipulated monthly income and waiver of premiums, under the provisions of total and permanent disability contained in a policy of life insurance issued by defendant upon the life of plaintiff.

On 31 July, 1929, plaintiff made written application to defendant company for a policy upon his life in the face amount of $2,000, the policy, among other features, contained disability benefits consisting of waiver of premiums and monthly income. Upon consideration of the application, defendant instructed plaintiff to be examined by its medical examiner, Dr. James R. Rogers, of Raleigh; and on 4 August, 1929, plaintiff presented himself to and was examined by Dr. Rogers.

On 19 August, 1929, in consideration of said application and medical examination and the payment by plaintiff of the initial semiannual premium of $37.94, defendant issued to plaintiff Policy No. 368913, for the face amount of $2,000. In said policy defendant agreed, upon due proof being submitted, "that the insured has become and is totally and presumably permanently disabled by bodily injury occurring or disease originating after the date on which this agreement became effective, and if no premium or installment thereof be in default": (1) To waive the payment of premiums under said policy, and to refund any premiums paid which would be subject to waiver; and (2) to pay to insured a monthly income of $10 for each $1,000 of the face amount of the policy during the period of disability. The semiannual premium of $37.94 was, under the policy, allocated to the benefits thereunder, as follows: For the ordinary death benefits a semiannual premium was charged of $31.28; for the accidental death benefits a semiannual premium was charged of $1.46; for the total and permanent disability benefits a semiannual premium was charged of $5.20, making a total semiannual premium of $37.94. The policy contained the following definitions of total and permanent disability: (a) "The irrecoverable loss of sight of both eyes or the total and permanent loss by accident or disease of the use of both hands, or of both feet, or of one hand and one foot, shall constitute total and permanent disability within the meaning of this agreement without prejudice to any other cause of disability, and in any such case the benefits will accrue from the date of such disability, anything to the contrary hereinbefore notwithstanding: Provided, however, that benefits shall not accrue more than six months prior to the date of receipt of such due proof." (b) "*Disability will be deemed to be total* whenever the insured becomes wholly disabled by bodily injury or disease, so that he is prevented thereby from engaging in any occupation and performing any work for compensation or profit, and under this agreement disability will be presumed to be permanent after such total disability has existed continuously for not less than three months."

Among other agreements and stipulations, said policy of insurance provided as follows: "If at any time before the policy anniversary nearest to the sixtieth birthday of the insured, and before the sum insured or any installments thereof becomes payable, due proof be submitted to the company at its home office in the city of New York that the insured has become and is totally and presumably permanently disabled by bodily injury occurring or disease originating after the date on which this agreement becomes effective, and if no premiums or installment thereof be in default, Home Life Insurance Company of New York hereby agrees: '1. To waive the payment of premiums under the said policy and under this agreement which becomes due after total disability has existed continuously for three months, but only during its continuance thereafter: Provided, however, that in no event shall a premium due more than six months prior to the date of receipt of such due proof be subject to waiver. In the event that any premium or premiums be paid which would be subject to waiver under this provision, the company will refund the same. 2. To pay to the insured a monthly income of $10 for each $1,000 of the face amount of the policy, commencing when total disability has existed continuously for three months and continuing thereafter during such disability, but not beyond the date when the sum insured, or any installment thereof, becomes payable: Provided, however, that in no event shall income payments accrue more than six months prior to the date of receipt of such due proof.' "

The company admitted the due execution and issue of the policy, and that plaintiff was under the age of sixty years.

The issues submitted to the jury and their answers thereto were as follows:

"1. Has the plaintiff, since 1 September, 1930, been totally and presumably permanently disabled from bodily injury occurring or disease originating after the issuance of the policy, as alleged in the complaint? Answer: 'Yes.'

"2. Was due proof submitted to the company at its home office in the city of New York that this insured had become and was totally and permanently presumably disabled by bodily injury occurring or disease originating after date on which the policy agreement became effective? Answer: 'Yes.'

"3. If so, on what date was such proof submitted? Answer: '4 January, 1932.' "

The court below rendered judgment on the verdict. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

J. L. Emanuel for plaintiff.

Winston & Tucker and Murray Allen for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

Plaintiff testified, in part: "I made application to the Home Life Insurance Company of New York for a policy of insurance on 31 July, 1929. After making application for the policy, on 4 August, 1929, the company sent me to Dr. James R. Rogers to be examined. I visited Dr. Rogers' office for this examination. He stripped me to my waist and tested my heart and lungs and my blood pressure. He took a specimen of my blood and urine; examined my eyes, head, nose, ears, and throat. In examining my eyes, he had some kind of a little light. *He looked into my eyes with it. He made me close one eye and look at a calendar on the wall about fifteen feet back, I reckon. He covered my eye with a card and told me to read certain things on the calendar, which I did.* He would cover the other eye and told me to read that on another calendar, and I read that. I did not do anything to prevent Dr. Rogers from examining me, or any part of my body, in connection with the policy of insurance. After the examination a policy was issued to me. These attachments were all connected with it. *At the time this policy was issued to me I was not suffering from any condition of my eyes or other part of my body.* At the time this policy of insurance was issued to me I was engaged in work as a carpenter foreman on the Raleigh High School on St. Mary's Street. At that time I did not experience any trouble in doing my work. I was able at that time to drive my own automobile. I was able at that time to walk across the streets and street intersections alone. From the time this policy was issued to me and up to the first of September, 1930, *I did not have any trouble with my eyesight.* I did not ever make any complaint about my eyesight." Q. "I will ask you to look at these gentlemen of the jury, and as I walk down before them tell me if you can see them. Can you see Mr. Kennedy, juror No. 1?" A. "I can't see none of them. All I can see is a blackness. I can't tell who nobody is. I can see only a black form. I am not able to tell whether Mr. Kennedy is wearing glasses or not. *Since the first of September, 1930, I have not been able to engage in any occupation for gain or profit.* I attempted to do work after the first of September, 1930. I tried to cover a little shed and fell off. *I have not been able to work at all since then.* At this time I am not able to drive my own automobile. I am not able to walk across street intersections alone, not safely. I get someone to come with me when I come to town. The last work I engaged in was in September, 1930, at the Catholic Orphanage for Southeastern Construction Company of Charlotte. At that time I was carpenter foreman." Q. "Now, what were you doing at the Catholic Orphanage at the time this accident occurred?" A. "Well, they had a wide span there in the floor on the third floor and it was swaggering. We went into the basement and was putting in steel cross-beams under the floor to hold the floor up, which was going to fall. We put steel beams in to hold it up. We worked there and were putting in the last beam when it slipped in some way. I was standing to the side and it hit me side of the head and knocked me unconscious about an hour or more. I have a scar on my head now from it. It is still here (indicating). *I have suffered with my eyes since then. My right eye is plumb out and my left is practically out. I can only tell a light, is all. My eyesight is getting worse.*"

The defendant contended, in part: "That since 1923, six years before the policy was issued, that Mr. Misskelley, the plaintiff, was suffering with choroiditis, a disease of the eye, and that when he was examined by Dr. Hicks in 1931 that the tissues and membranes of the eyes, or the membranes composing the eye, were found to be scarred, or some of them were, showing that the disease had continued for some length of time. That he is not permanently and totally disabled."

On these disputed facts, which were corroborated by evidence on both sides of the controversy, the court below, at the request of defendant, gave the following instructions: "Now, the defendant has requested the court to give you certain instructions, which I will now proceed to do. I instruct you that if you find from the evidence, and by its greater weight, that the plaintiff has become and is totally and permanently presumably disabled from bodily injury or disease, such disease affecting his eyesight and thereby rendering him totally and permanently disabled, and if you further find that he was suffering from a disease which affected his eyesight, known as choroiditis, in the year 1923, and that the effect of this disease upon his eyesight continued until after 19 August, 1929, you will answer the first issue 'No.' If you find from the evidence that the plaintiff had the disease known as choroiditis in the year 1923, and that his permanent and total disability, if you find that he is now totally and permanently disabled, is the result of such disease, you will answer the first issue 'No.'" The court further instructed the jury: "Now, as I have stated to you, the burden is upon the plaintiff to satisfy you by the greater weight of the evidence, and I have explained what that phrase means. If he has so satisfied you, that is to say, by the greater weight of the evidence, that he has been totally and presumably permanently disabled from bodily injury occurring or disease originating after the issuance of the policy, it will be your duty to answer the first issue 'Yes.' If you do not so find, it will be your duty to answer the first issue 'No.'"

The first issue was: "Has plaintiff, since 1 September, 1930, been totally and presumably permanently disabled from bodily injury occurring or disease originating after the issuance of the policy, as alleged in the complaint?" The jury answered this disputed fact "Yes," in favor of the plaintiff.

Under Article IV, sec. 8, of the Constitution of North Carolina, this Court has "jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference," etc. Taking the evidence in the light most favorable to plaintiff, it was ample to have been submitted to the jury.

The second issue was: "Was due proof submitted to the company at its home office in the city of New York that this insured had become and was totally and permanently presumably disabled by bodily injury occurring or disease originating after date on which the policy agreement became effective?" The jury answered this issue "Yes." The third issue was: "If so, on what date was such proof submitted?" The jury answered: "4 January, 1932." On the second issue the defendant requested the court below to charge the jury: "The court instructs you that upon all of the evidence in this case you will answer the second issue 'No.'" The court below refused to give this prayer for instruction, and in this we can see no error.

On 21 September, 1931, the following letter was written from headquarters of the American Red Cross at Raleigh, N. C., signed by Hal. W. Young and Mrs. Hubert Young, executive secretary: "Re: Misskelley, Charlton E. Gentlemen: The above World War veteran is a holder of Policy No. 368913, with disability clause for payment on account of permanent and total disability. Mr. Misskelley was rated as totally and permanently disabled by the Veterans' Bureau on account of blindness in January, 1931, and is receiving the maximum amount of $40 per month for non-service connected disability under World War Veterans' Act, 1924, as amended 3 July, 1930. From Mr. Misskelley's receipt, I note that he made a payment on this insurance on 19 August, 1931. Is he not entitled to a refund of this payment as well as payment on policy dated from January, 1930. Kindly advise me regarding this at your earliest convenience, as Mr. Misskelley has been obliged to give up all work and is entirely dependent on his wife and parents for support. I am attaching hereto letter from the Veterans' Bureau and copy of act. Assuring you of our appreciation and coöperation. Very truly yours."

On 24 September, 1931, defendant's assistant actuary answered and addressed the letter to Mrs. Hubert Young, executive secretary, as follows: "Re: Policy No. 368913--Charlton E. Misskelley. Dear Madam: We are in receipt of your letter of 21 September enclosing a copy of a letter from the Veterans' Bureau and a copy of the World War Veterans' Act, with reference to the above insured's disability. We herewith enclose forms for proof and claim of the disability under Policy No. 368913. Will you kindly have the insured complete the one statement, and have the other completed by his attending physician? If his disability claim is approved, the premium due 19 August will be refunded and waived, provided that he was totally disabled for three months prior to the end of the grace period."

On 4 January, 1932, Mrs. Hubert Young, executive secretary, sent the following letter to defendant: "Re: Misskelley, Charlton E. Dear Sirs: Attached hereto are claim for disability benefits, also statements from Dr. John B. Wright and Dr. V. M. Hicks, this city." In this letter was "Claim for disability benefits submitted to Home Life Insurance Company," signed by plaintiff, with attending physicians' statements. This statement of plaintiff is about the same as his testimony on the trial. The physician's statement, who examined him 23 April, 1931, says: "(16) Does the disability completely prevent the insured from doing work of any kind or engaging in any business or occupation? No. Since what date? ....day of................, 19......... (17) From present indications, what seems the most probable future course of the disease? Describe as fully as you can. Eyesight gradually (slowly) being impaired. (18) What are the prospects that the insured will recover to the extent of being able to do work of some kind, or to engage in any occupation or business, even in a limited way? (State why.) Good. Why—because he was not totally blind, or was not the last time I saw him."

On 11 February, 1932, plaintiff received a letter from defendant company's assistant actuary, which reads as follows: "Re: Policy No. 368913. Dear Sir: This is in reference to your claim for an allowance of the disability benefits under the above-numbered policy. We note that the doctor who completed the attending physician's statement for you has not been attending you, but only examined you on 25 April, 1931. From the evidence submitted by him, and that of the company's examiner, it appears that there has been an impairment in your vision, but it does not appear that your vision is impaired to such an extent that you are unable to engage in any occupation. Furthermore, we are in receipt of evidence to the effect that you had a choroiditis in the right eye, which essentially destroyed the vision of that eye some eight or nine years ago. The above-numbered policy was issued in connection with your application, for it is dated 31 July, 1929. In your application for the insurance and declaration to our examiner at the time of your examination in connection with the application, you apparently withheld this information from the company. We wish to call your attention to the disability contract issued in connection with your policy, which provides for benefits only if due proof be submitted to the company 'that the insured has become and is totally and presumably permanently disabled by bodily injury occurring or disease originating after the date on which this agreement became effective.' *Since you claim disability on account of a disease which apparently originated before the date on which the contract became effective, this alone would preclude us from allowing your claim."* (Italics ours.)

On this second issue, the court below charged the jury as follows: "The burden here is upon the plaintiff, Mr. Misskelley, to satisfy you by the greater weight of the evidence. He contends, gentlemen of the jury, that he wrote to the company, but could hear nothing from them; that he received no reply to his letters, or any of the communications, until Mr. Misskelley requested the good offices of the Raleigh Chapter of the Red Cross to write, and that when Mrs. Young, secretary of the Red Cross, wrote, they then replied to Mrs. Young, and that as soon thereafter as practicable they sent in proofs of claim on the blanks furnished by the company. Now, Mr. Misskelley contends that he wrote his first letter to the company on 15 January, 1931, and that you should so find, and that upon receiving no reply to that letter, he then requested Mrs. Misskelley to write, and that she wrote once or twice, but received no reply; that then, at the request of either Mr. or Mrs. Misskelley, Mrs. Young then wrote to the company and got the blanks upon which proof of claim was made. He contends that the company was advised of notice of his disability on 15 January, 1931, and that you should answer the second issue 'Yes.' Now, the defendant, on the other hand, contends that it received no such letters; that it received no letters from either Mr. Misskelley or Mrs. Misskelley, and that you should so find. (Now, I instruct you, gentlemen, that it is a presumption of law that when a letter is properly addressed and stamped and placed in the mail that it was received. That presumption may be rebutted, however.) Now, Mr. Misskelley contends that on 15 January, 1931, he wrote a letter in his own hand; that it was properly stamped and duly addressed and placed in the postoffice at Raleigh, and that you should so find; that thereafter his wife wrote one or two letters, and addressed them properly and placed the required amount of stamps upon the letters, or letter, and mailed the same in the postoffice in Raleigh, and that you should so find, and contends further that you should answer the issue 'Yes.' The defendant contends that you should answer the issue 'No.' Now, if the plaintiff has satisfied you by the greater weight of the evidence that due proof was submitted, it will be your duty to answer the second issue 'Yes.' If he has not so satisfied you, it will be your duty to answer the issue 'No.'" From the finding of the jury, the exception and assignment of error to the foregoing portion of the charge in parentheses becomes immaterial. The defendant contends that under the policy this was not "due proof." We cannot so hold.

Plaintiff in his complaint alleged: "(7) That plaintiff has submitted due proof to the defendant at its home office in the city of New York; but defendant has written plaintiff denying its liability, and has declined to recognize his claim, and refused to pay the same." The defendant in its answer says: "(7) Answering the allegations in paragraph 7, defendant denies that plaintiff has submitted due proof to it at its home office in the city of New York. It is admitted that defendant has denied liability and declined and refused to recognize and pay plaintiff's claim for the reasons set forth in this answer."

In Cyclopedia of Insurance Law (Couch), Vol. 7, p. 5545, part sec. 1573, is the following: "Based largely upon the principle or theory that the law does not require a vain, useless, or unnecessary thing, that is, something that will be unavailing, the general rule is that a denial by the insurer, or its authorized agent, or liability under its policy, if made during the period of presentation of proofs, will operate as a waiver of a provision which is merely a condition precedent to the bringing of an action, such as one requiring notice and proofs of loss—at least, where the denial is based upon grounds other than the failure to furnish such notice or proofs."

In Cooley's Briefs on Insurance, Vol. 7 (2d ed.), at p. 6019, the principle is stated: "A failure to give notice or furnish proofs of loss, or defects in the notice and proofs, are waived by a denial of liability on other grounds."

In *Gerringer v. Ins. Co.*, 133 N. C., 407 (415), we find: "The weight of authority is in favor of the rule that a distinct denial of liability and refusal to pay, on the ground that there is no contract or that there is no liability, is a waiver of the condition requiring proof of loss or death. It is equivalent to a declaration that they will not pay, though the proof be furnished." *Jordan v. Hanover F. Ins. Co.*, 151 N. C., 341; *Higson v. North River Ins. Co.*, 152 N. C., 206; *Shuford v. Life Ins. Co.*, 167 N. C., 547; *Lowe v. Fidelity & Cas. Co.*, 170 N. C., 445; *Moore v. General A. F. & L. Assur. Corp.*, 173 N. C., 532; *Mercantile Co. v. Ins. Co.*, 176 N. C., 545; *Proffitt v. Ins. Co.*, 176 N. C., 680; *Taylor v. Ins. Co.*, 202 N. C., 659; *Smith v. Assurance Society, ante,* 387.

The principles above enunciated apply to life as well as fire insurance. In a policy similar to the one under consideration, we find, in *Federal Life Ins. Co. v. Lewis,* 183 Pac. Rep. (Okla.), 975, the following: "The provision in the insurance policy requiring proof of total disability to be furnished the company within a certain definite time is waived by the company denying liability within such time upon other grounds than failure to furnish proof of total disability." *Insurance Co. v. Tackett,* 149 Okla., 147, 299 Pac. Rep., 862; *Insurance Co. v. Callahan,* 57 S. W. (2d), 1083.

The attending physician's statement as to plaintiff's condition is not conclusive on plaintiff's right to recover. *Fields v. Assur. Co.,* 195 N. C., 262; *Buchholz v. Metropolitan Life Ins. Co.,* 160 S. W., 573, 177 Mo. App., 683.

The court below charged the jury as follows: "Now, gentlemen of the jury, the policy provides: 'Totally disabled by injury or disease, so that he is prevented thereby from engaging in any occupation and performing any work for compensation or profit.' 'Prevented thereby from engaging in any occupation and performing any work for compensation or profit.' You are doubtless asking yourself the question: Just what does that mean? What does 'prevented thereby from engaging in any occupation and performing any work for compensation or profit' mean? (I instruct you, gentlemen of the jury, that the question for you is: Was he prevented from working with reasonable continuity in his usual work, or in such work as he, Mr. Misskelley, is qualified physically and mentally under all the circumstances to do, substantially the reasonable and essential duties incident thereto? I will state that to you again, so that there may be no possibility of error: Was he prevented from working with reasonable continuity in his usual work, or in such work as he, Mr. Misskelley, is qualified physically and mentally under all the circumstances to do, substantially the reasonable and essential duties incident thereto?) (Now, I instruct you that 'ability to do odd jobs of a comparatively trifling nature does not prevent a recovery.') (So, gentlemen of the jury, it is a question of fact for you. If you find that he has been, since the first of September, totally and presumably permanently disabled from bodily injury occurring or disease originating after the issuance of the policy, as alleged in the complaint, it will be your duty to answer the issue 'Yes.' ") To the foregoing portions of the charge in parentheses defendant excepts and assigns error. We see no error in the charge.

The charge is substantially that approved in *Bulluck v. Ins. Co.,* 200 N. C., 642 (646): "The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation, or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions, and the decisions of courts generally, have established the principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.' " *Smith v. Assurance Co., ante,* 387.

In *Austell v. Volunteer State Life Ins. Co.,* 170 S. E., 776, decided 13 September, 1933 (S. C.), that Court approved the construction heretofore placed by the Court on this subject, and said in part: "Our Supreme Court said in the *McCutchen case,* 153 S. C., 401, 151 S. E., 67, 71: 'On the contrary, the courts, giving consideration to the object of the contract, hold that the "total disability" contemplated by the agreement is inability to do substantially all of the material acts necessary to the prosecution of the insured's business or occupation, in substantially his customary and usual manner.' "

In *Federal Life Ins. Co. v. Lewis, supra,* is the following: "The word 'total' disability is construed by this Court in the case of *Continental Casualty Co. v. Wynne,* 36 Okla., 325, 129 Pac., 16, which states as follows: 'Total disability, under the provisions of an accident insurance policy, does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It exists, although the insured may be able to perform a few occasional or trivial acts relating thereto, if he is not able to do any substantial portion of the work connected with his occupation.' "

In Cyc. of Ins., *supra,* at p. 5807, it is said: "And where loss of sight of both eyes is expressly declared to constitute total and permanent disability, the ability of the insured, after such a loss, to perform some work for compensation of financial value is immaterial." *Wamboldt v. Ins. Co.,* 191 N. C., 32, 45 A. L. R., 1360.

The court below charged the jury on the third issue as follows: "If you do consider it, it will be your duty to write for your answer such date as the plaintiff by the greater weight of the evidence has satisfied you that the company had notice of his disability, or proof of his disability." Defendant excepted and assigned error to this charge, contending that notice and proof were not synonymous, and that the words used in the contract were "due proof," and that this contemplates more than mere notice of disability. We think the position taken by the defendant is too technical. In *American Nat. Ins. Co. v. Callahan,* 51 S. W. Rep. (2d series), at page 1086, is the following: "The meaning of the word 'due' in the term 'due proof' is determined by the connection in which it is used. It has been the subject of many decisions by the courts. As used here, we think it refers to the time when the proof is to be furnished rather than the sufficiency or conclusiveness of the proof to establish the facts."

In Couch on Insurance, Vol. 7, part sec. 1540, p. 5492, it is stated thus: "The question then arises: What is 'due notice and proof?' It does not rest with the insurers alone to decide this question; rather, the provision requires such notice and proof as may appear to a court to be in accordance with the rules of evidence, and, if such notice and proof have been given, then there has been a compliance with the provisions. The question, then, as to what is due proof is to be determined by the courts, according to the rules of evidence, and not by the insurers. And due proof of a claim of loss under a policy means such a statement of facts, reasonably verified, as, if established in court, would *prima facie* require payment of the claim, and does not mean some particular form of proof which the insurer arbitrarily demands; nor does the statement of one adequate fact in the proofs exclude others omitted through mistake or ignorance." See sec. 1552.

The charge does not impinge C. S., 564. We do not think the exceptions and assignments of error to the admission of the testimony of Dr. L. N. West, Dr. V. M. Hicks, and Dr. John B. Wright can be sustained. They were admitted to be experts. We see no error in excluding certain questions propounded to Dr. James R. Rogers in regard to the use of ophthalmoscope. The instructions not given, prayed for by defendant, were properly refused. In the instructions to the jury by the court below we see no error. They were carefully and accurately given and the case tried in accordance with the law in this and other jurisdictions. The case of *Thigpen v. Ins. Co.*, 204 N. C., 551, relied on by defendant is easily distinguishable from the present case.

From a careful review of the record and law applicable to the facts, we can see, in law,

No error.

STATE OF NORTH CAROLINA, ON THE RELATION OF A. G. MYERS AND OTHERS, CONSTITUTING THE TRANSPORTATION ADVISORY COMMISSION, v. WILMINGTON-WRIGHTSVILLE BEACH CAUSEWAY COMPANY AND OTHERS.

(Filed 13 December, 1933.)

1. **Eminent Domain D b—Held: parties waived right to preliminary hearing by commissioners by stipulation entered in the trial of the cause.**

Where it is stipulated by the parties in condemnation proceedings that a hearing before commissioners appointed by the clerk under the provisions of C. S., 1716, should be waived, and judgment is rendered determining the amount of damages, and on appeal the Supreme Court affirms the judgment as to the compensation allowed and remands the cause for error in the exclusion of another element of compensation to which defendants are entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation the parties are bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exception to the trial of the issue without such preliminary hearing will not be sustained.

2. **Eminent Domain D c—Expert testimony as to necessity for and reasonableness of expenditure made necessary by taking of lands held competent.**

In this condemnation proceeding it was adjudged that defendants were entitled to the amount reasonably required for the construction of a drawbridge made necessary in order for defendants to maintain their franchises by plaintiff's taking of other lands of defendants for an inland water-way. Defendants introduced an expert witness who testified that certain expenditures made by defendants were reasonable in amount and necessary to the construction of the bridge: *Held*, the testimony was competent for the purpose for which it was offered, and even if it should be held incompetent, its admission would not constitute reversible error.

3. **Eminent Domain C e—Defendant in condemnation proceedings may recover interest when it is a part of the damages sustained.**

Just compensation for the taking of lands includes all elements of damages, and where it is adjudged that defendant in condemnation proceedings was entitled to the amount reasonably expended for the construction of a drawbridge made necessary for the maintenance of defendants' franchises as public-service corporations by plaintiff's taking other lands of defendants for an inland water-way, an instruction that defendants were entitled to recover, as a part of the reasonable cost of constructing the bridge, the reasonable costs of necessary preliminary surveys, and interest on the amounts reasonably expended in the construction of the bridge from the time of their expenditure, *is held* without error.

APPEAL by plaintiff from *Devin, J.*, at April Term, 1933, of NEW HANOVER. No error.

This action was begun in the Superior Court of New Hanover County on 15 July, 1929.

On the facts alleged in the complaint, the plaintiff prays judgment: (1) that the plaintiff and the United States are the owners of the strip of land described in the complaint; that said strip of land is needed as part of the right of way for the Inland Waterway Canal, which is now under construction through the State of North Carolina, as authorized by an act of Congress, and that the plaintiff has the right to use said strip of land for that purpose without paying compensation therefor to the defendants; or (2) that if it be adjudged that the defendants, or either of them, have any interest in said strip of land, such interest be condemned, in order that plaintiff may take the same under the right of eminent domain conferred upon the plaintiff by statute, and that the amount of compensation therefor be determined as provided by law.

The defendants in their answers deny that the plaintiff or the United States is the owner of the strip of land described in the complaint. They allege that the defendants are the owners in fee of said strip of land, their respective interests being as set out in their answers. The defendants admit that plaintiff has the right to take the said strip of land, under the right of eminent domain, but pray that the plaintiff be ordered to pay to defendants just compensation for the taking of said strip of land.

The action was first heard at September Term, 1929, of the Superior Court of New Hanover County by Grady, J. At this hearing the defendants moved that the action be dismissed on the grounds set out in their motion, which was in effect a demurrer *ore tenus* to the complaint, for that the facts stated therein are not sufficient to constitute a cause of action. The motion was denied. On defendants' appeal to the Supreme Court, the order of Judge Grady was affirmed. See 199 N. C., 169, 154 S. E., 74. Under this order, the plaintiff has entered into possession of the strip of land described in the complaint.

The action was next heard at May Term, 1931, of the Superior Court of New Hanover County by Midyette, J. At this hearing a trial by jury of the issues of fact raised by the pleadings was waived and, pursuant to the agreement of the parties, Judge Midyette heard evidence. On the facts found by Judge Midyette, it was adjudged and decreed that each of the defendants is entitled to just compensation for the taking of its interest in the strip of land described in the complaint, as of the date of the taking of the same by the plaintiff. It was ordered that the action be and the same was retained for the determination of the amount of compensation and of damages which the defendants are entitled to recover of the plaintiff.

The action was next heard at January Special Term, 1932, of the Superior Court of New Hanover County, by Barnhill, J. At this hearing a trial by jury of the issue then involved in the controversy was waived and, pursuant to the agreement of the parties, Judge Barnhill heard the evidence pertinent to such issue, which was as follows:

"What amount are the defendants entitled to recover of the plaintiff as compensation for the lands taken and condemned for a right of way for the Inland Waterway Canal over and across the lands of the defendants?"

On the facts found by Judge Barnhill, it was ordered and adjudged that the defendants recover of the plaintiff, as just compensation for the lands taken by the plaintiff and the easement imposed thereon, the sum of $21,840.34, with interest from 4 November, 1930, and the costs of the action. Judge Barnhill was of the opinion that the defendants are not entitled to recover of the plaintiff, as an element of the compensation to be paid to them by the plaintiff, the cost of the construction of the drawbridge, which they were required to construct over and across the canal, in order to maintain their franchise as public-service corporations, and for that reason declined to consider such cost in determining the amount of such compensation.

On defendants' appeal from the judgment of Judge Barnhill, it was held by the Supreme Court that there was error in his refusal to consider the evidence tending to show the reasonable cost of said drawbridge, and to include such cost in the amount of the judgment. Because of such error, the action was remanded to the Superior Court of New Hanover County in order that the reasonable cost of the construction of the drawbridge might be determined by said court, and when determined, included in the judgment. See 204 N. C., 260, 167 S. E., 858.

The action was next heard at April Term, 1933, of the Superior Court, by Devin, J. At this hearing Judge Devin ruled that both plaintiff and the defendants had waived the right to have the reasonable cost of the construction of the bridge determined by commissioners, to be appointed by the clerk, under the provisions of the statute, but that neither of the parties had waived the right to have such cost found by a jury. In accordance with this ruling, a jury was empaneled. An issue was thereupon submitted to the jury, as follows:

"What amount are the defendants entitled to recover of the plaintiff for the reasonable expense of the construction of the bridge over the right of way of the Inland Waterway Canal?"

Evidence pertinent to this issue was offered by both the plaintiff and the defendants, and after the charge of the court, the issue was answered as follows: "$89,166.67, with interest."

Thereupon judgment was rendered, as follows:

"This cause having come on to be heard, and being heard before the undersigned judge and a jury at the April Term, 1933, of the Superior Court of New Hanover County, and having been tried in accordance with the decision of the Supreme Court duly reported in the 204th North Carolina Report, at page 260; and it appearing to the Court that at a former trial of this cause Judge Barnhill entered judgment herein in favor of the defendants, Tidewater Power Company and the Wilmington-Wrightsville Beach Causeway Company, and against the plaintiff, for the sum of $21,840.34, with interest from 4 November, 1930, and that said judgment has been affirmed by the Supreme Court of North Carolina, and that that Court ordered and directed that the action be remanded to the Superior Court of New Hanover County for trial to the end that the reasonable cost of the drawbridge might be added thereto, and the court having submitted an issue to the jury as to what the reasonable cost of the drawbridge was, and the jury having returned its verdict in the amount of $89,166.67, with interest, as follows:

" 'What amount are the defendants entitled to recover of the plaintiff for the reasonable expense of the construction of the bridge over the right of way of the Inland Waterway?' Answer: '$89,166.67, with interest.'

"And it appearing to the court from the uncontradicted evidence that the construction of said bridge was completed, and the bridge opened for traffic, on 11 June, 1931, and the court being of the opinion and having charged the jury that interest on said amount might be allowed from said date;

"And it further appearing to the court that this action was brought by the plaintiff under and in pursuance to the provisions of chapter 44 of the Public Laws of North Carolina, 1927, as amended by chapter 4, Public Laws of 1929;

"And it further appearing to the court that under said acts it is declared that the compensation so awarded shall be a valid claim against the State of North Carolina, and that such compensation shall be paid in accordance with the provisions of said statute;

"It is, therefore, on motion of counsel for the defendants, ordered, considered, adjudged, and decreed:

"1. That the judgment rendered and filed by Judge M. V. Barnhill on or about 27 February, 1932, as set out in the opinion of the Supreme Court of North Carolina, to the effect that the defendants recover of the plaintiff the sum of $21,840.34, with interest from 4 November, 1930, be affirmed in accordance with the opinion of the Supreme Court of North Carolina.

"2. That, in addition to said judgment, the defendants, Wilmington-Wrightsville Beach Causeway Company and Tidewater Power Company, recover of the State of North Carolina, and of the plaintiff, as the representative of the said State, the sum of $89,166.67, with interest on said sum from 11 June, 1931, and the costs of this action, to be taxed by the clerk of this court.

"3. That in accordance with the terms of said statute, this judgment shall be and is hereby declared to be a valid claim against the State of North Carolina."

From the said judgment the plaintiff appealed to the Supreme Court.

Bryan & Campbell for plaintiff.

Thos. W. Davis, L. J. Poisson, Geo. Rountree and J. O. Carr for defendants.

CONNOR, J. When this action was called for trial in the Superior Court of New Hanover County, at April Term, 1933, Judge Devin ruled that both the plaintiff and the defendants had waived a hearing by commissioners to be appointed by the clerk under the provisions of C. S., 1716, of the only matter then to be tried in accordance with the decision of this Court on defendants' appeal from the judgment at January Special Term, 1932. See 204 N. C., 260, 167 S. E., 858. The plaintiff excepted to this ruling, and on its appeal to this Court assigns same as error. This assignment of error is not sustained.

This action was begun by the plaintiff in the Superior Court of New Hanover County primarily to recover judgment that plaintiff, by virtue of the provisions of chapter 44, Public Laws of North Carolina, 1927, as amended by chapters 4 and 7, Public Laws of North Carolina, 1929, had the right to take possession of the strip of land described in the complaint, without paying compensation therefor to the defendants, who were then in possession thereof, claiming title thereto; and, secondarily, if it should be adjudged that plaintiff had no right to take possession of said strip of land, without paying compensation therefor, to recover judgment that plaintiff had the right to take possession of said strip of land, upon the payment to the defendants of just compensation for the same. In the latter event, plaintiff prayed that the amount of such compensation be determined as provided by law. It was adjudged at the hearing before Judge Midyette that plaintiff had the right to take possession of said strip of land, but that defendants, as the owners of the same, were entitled to just compensation therefor. Thereafter, the only issue to be tried involved the amount of compensation and damages which the defendants were entitled to recover of the plaintiff. This issue was tried by Judge Barnhill, at January Special Term, 1932. At this trial it was expressly stipulated by the parties to the action that the issue should be tried by the court, and not by a jury, and that "failure to have a hearing before commissioners, and all other omissions and irregularities in the preliminary proceedings were likewise waived." By reason of this stipulation, there was no error in the ruling of Judge Devin that both the plaintiff and the defendants had waived the right, if any they or either of them had, to a preliminary hearing by commissioners of the issue involving the amount of compensation to which the defendants were entitled for the taking of their property by the plaintiff.

Whether the waiver of trial by jury and the agreement that the issue should be tried by the court made at the hearing before Judge Barnhill was binding on the parties at the subsequent hearing before Judge Devin need not be decided. The defendants did not insist that the issue should be tried by the court, or except to the submission of the issue to a jury.

During the progress of the trial the plaintiff excepted to rulings by the court on its objections to certain testimony of an expert witness, which was offered by the defendants as evidence tending to show that certain expenditures made by the defendants in the construction of the bridge over and across the Inland Waterway Canal were reasonable in amount, and required for the construction of said bridge. Assignments of error based on these exceptions cannot be sustained. The testimony was competent for the purpose for which it was offered and submitted to the jury. Even if it should be held otherwise, its admission could not be held as reversible error, for which a new trial should be ordered.

After a full and lucid statement of all the matters involved in the issue, the court instructed the jury as follows:

"So it is necessary for you to find from the evidence, by the greater weight of the evidence, what was the amount reasonably expended by the defendants in the construction of the bridge over the right of way of the Inland Waterway, or canal, in order to maintain their respective franchises as public-service corporations, and to preserve the value of their property not included in the right of way.

"This would include not only the amount reasonably expended for materials and labor that went into the construction of the drawbridge, but would also include preliminary expenses, reasonably and necessarily incurred, and reasonable expenses for engineering, plans, supervision, and inspection costs, and the costs of putting cable underground for the operation of the drawbridge machinery, and compensation for the amount reasonably expended in the construction of the drawbridge; it would also include interest on the money expended by the defendants during the construction of the drawbridge as an item of expense in the construction of the drawbridge from the time such expenditures began in November, 1930, until the completion of the drawbridge on 11 June, 1931."

Assignments of error based on plaintiff's exceptions to this instruction cannot be sustained.

In *Seaboard Air Line Railway Company et al. v. United States*, 261 U. S., 299, 67 L. Ed., 664, it is said: "The requirement that 'just compensation' shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest, or its equivalent, is a part of such compensation."

A careful examination of the record discloses no error in the trial of this action. The judgment is affirmed.

No error.

STARMOUNT COMPANY v. TOWN OF HAMILTON LAKES.

(Filed 13 December, 1933.)

1. Municipal Corporations A a—There are no constitutional restrictions on the power of the Legislature to create municipal corporations.

There are no constitutional restrictions upon the power of the General Assembly to create municipal corporations, and where a municipal corporation is duly created by private act, and the town is organized under the act after due notice as required by law, the smallness of the population of the incorporated area does not affect the validity of its incorporation, and it is a duly created and organized municipality.

2. **Taxation A a: Municipal Corporations K a—**

The courts determine what are necessary municipal expenses, and the governing body of the municipality determines in its discretion whether a given project is necessary for the particular municipality.

3. **Same—Held: bonds in this case were issued for necessary municipal expenses as defined by courts, and vote of residents was unnecessary.**

Water systems, sewer systems and street improvements are necessary expenses of a municipality, and bonds for such purposes may be issued by the governing body of a municipality without a vote of its residents, Art. VII, sec. 7, and bonds issued by a municipality for these purposes will not be declared invalid on the ground that the purposes for which the bonds were issued were not necessary for the particular municipality because of its small population, the determination of the necessity of the improvements for the particular municipality being exclusively in the discretionary power of its governing body.

4. **Taxation A f: Municipal Corporations K c — Legislature may cure formal irregularities in bond issue by validating act.**

Where the Legislature has validated bonds issued by a municipal corporation for necessary expenses, objections to their validity on the ground that a majority of the commissioners of the town issuing the bonds lived outside the corporate limits will not be sustained, the Legislature having the power to authorize the issuance of bonds for necessary expenses and to clothe designated persons with the power to execute same for and in behalf of the municipality, and, therefore, having the power to ratify their issuance.

CIVIL ACTION, before *Harding, J.*, at October Term, 1932, of GUILFORD.

The parties by stipulation agreed that certain facts should constitute all the evidence in the case. The facts pertinent to the questions of law involved may be stated substantially as follows: The plaintiff is a private corporation and the defendant is a municipal corporation created pursuant to chapter 161 of the Private Laws of 1925 as amended by chapter 190, Private Laws of 1927. Notice of application for a special act creating the defendant as a municipal corporation was duly published as required by law.

Prior to 31 July, 1924, A. M. Scales was the owner of a large tract of land, containing approximately 1,400 acres, lying near the corporate limits of the city of Greensboro. Subsequent to the purchase of the property, Scales began to develop the land as a residential subdivision by laying off streets, alleys, parks, lake sites, and building lots. On 31 July, 1924, Scales borrowed from the Revolution Cotton Mills the sum of $400,000, and as evidence of said indebtedness, delivered his note in said sum, dated 31 July, 1924, and in order to secure the payment thereof executed and delivered to the Atlantic Bank and Trust Company as trustee a deed of trust conveying approximately 1,400 acres of land. As a part of the agreement Scales entered into a contract with the Revolution Cotton Mills providing that a private corporation should be formed, known as Hamilton Lakes, and that Scales should convey to said private corporation the land covered by said deed of trust, and to receive in payment thereof from the corporation five thousand shares of the capital stock, and that the said Scales should give to the Cotton Mills one thousand shares of said stock of the par value of $100.00 per share. It was further agreed that the Revolution Cotton Mills as the owner of said 1,000 shares of stock should at all times be represented on the board of directors, and that no salaries should be fixed and no additional property purchased by the corporation except with the unanimous consent of all the directors. This agreement was perfected, the land conveyed, the stock issued, and Julius Cone, vice-president of the Revolution Cotton Mills and president of the Atlantic Bank and Trust Company, trustee under the deed of trust, was elected vice-president and director of the private corporation known as Hamilton Lakes. On or about 1 December, 1926, the said 1,000 shares of stock owned by Revolution Cotton Mills, together with the Scales note for $400,000 and the deed of trust securing same, were acquired from Revolution Cotton Mills by Mrs. Bertha S. Sternberger and her two daughters, Miss Amelia Sternberger and Mrs. Blanche Sternberger Benjamin. Mrs. Bertha S. Sternberger at that time was president of the Revolution Cotton Mills. The Sternbergers, after acquiring the stock and note aforesaid, sold the 1,000 shares of stock to Scales for $150,000. The purchase price was evidenced by a note for that sum, secured by a second deed of trust upon certain lands containing approximately 2,700 acres, part of which was known as the "Descaler Tract" located near the city of Greensboro and near the town of Hamilton Lakes.

It thus appears at this point that the relationship of the parties was as follows: Hamilton Lakes, a private corporation, of which A. M. Scales was the president and major stockholder, owned 1,400 acres of land subject to a deed of trust for $400,000 securing a note of like amount originally payable to the Revolution Cotton Mills and subsequently purchased by the Sternbergers. Thereafter Hamilton Lakes, a municipal corporation, was created by the Legislature of North Carolina by virtue of the private acts above referred to. The boundaries of the town of Hamilton Lakes, a municipal corporation, included, among other lands, the 1,400 acres described in the deed of trust.

In October, 1925, the town of Hamilton Lakes, a municipal corporation, issued coupon bonds described as "water and sewer bonds, dated 1 October, 1925, in the aggregate principal amount of $100,000; that said bonds were 100 in number, numbered from 1 to 100, inclusive, and of the denomination of $1,000 each," etc.

On 1 September, 1926, the town of Hamilton Lakes, a municipal corporation, issued coupon bonds, described as "Street Improvement Bonds" in the sum of $100,000. It was stipulated by the parties "that all requirements of law were met with respect to the issuance and sale of said water and sewer bonds and with respect to the issuance and sale of said street improvement bonds, with certain exceptions as follows: That said stipulation "shall not be construed to prevent the plaintiff from arguing that said water and sewer bonds and said street improvement bonds are invalid, for that they were not issued for necessary expenses within the meaning of the Constitution and statutes of North Carolina; nor shall it prevent the plaintiff from arguing that said water and sewer bonds and said street improvement bonds are invalid because there was no submission of said issue to the qualified voters of the town of Hamilton Lakes, nor any election thereon, nor that the sale and delivery of said bonds to said private corporation was irregular and void." It was stipulated that provision was duly made for the public sale of the bonds, and that notice of sale was duly published as required by law, and that the only bid for as much as par was made by the private corporation, Hamilton Lakes, Incorporated, which offered par and accrued interest for said bonds, and that receipts were issued by the duly authorized representatives of said town of Hamilton Lakes showing that said bonds were paid for in full. Each bond in controversy contained a recital "that all acts, conditions and things required to be done, happen and exist, precedent and in the issuance of this bond, have been done, have happened, and do exist, as required by the Constitution and laws of the State of North Carolina; that provision has been made for the levy and collection of an annual tax upon all taxable property within the said municipality sufficient to pay the interest hereon and the principal hereof as the same fall due, and that the total indebtedness of same does not exceed any constitutional or statutory limitation. For the prompt payment hereof, both principal and interest, the full faith, credit and resources of said municipality are hereby irrevocably pledged. The ordinances authorizing the bond issues provided that they should take effect thirty days after their first publication, unless a petition for popular vote was filed in accordance with the provisions of the municipal finance act. The ordinances were duly published and no petition for popular election was filed. The entire issue of water, sewer and street improvement bonds of the town of Hamilton Lakes, aggregating the principal amount of $200,000, was sold by the private corporation, Hamilton Lakes, Incorporated, to David Robinson and Company for the sum of $160,000, plus accrued interest. In purchasing said bonds

David Robinson and Company required the individual guarantee of payment of A. M. Scales.

After the issuance and sale of said bonds the town council of Hamilton Lakes took appropriate steps to lay water and sewer mains and let contracts for said purpose, and did in fact lay approximately 81 miles of water main and 7½ miles of sewer main at a cost of at least $100,000. Upon petition of property owners within the town, certain streets were paved and assessments against abutting property were made, and in the absence of objection the assessments were confirmed and the town graded and improved approximately twenty-two miles of its streets and paved approximately three miles of its streets at a cost of not less than $100,000. The paving and street improvement work was done by Zeigler Brothers by contract, and no part of the amount having been paid by the town, the said Zeigler Brothers instituted suit and obtained judgment against the town, and a mandamus proceeding was instituted against the town and an order entered requiring the town council of Hamilton Lakes to levy a special tax for the payment of said judgment.

The Legislature in 1927 enacted chapter 98 of the Private Laws of North Carolina, entitled "An act to validate bonds of the town of Hamilton Lakes." Said act was duly passed as required by law, and particularly as required by Article II, section 14, of the Constitution. The act was ratified 2 March, 1927.

The original Scales note of $400,000 to Revolution Cotton Mills was assigned to Mrs. Benjamin. Default was made in the payment of the debt and the deed of trust was foreclosed, and at the sale 1,256 acres of land covered by the deed of trust were purchased by the Starmount Company, which had been organized to acquire title to the property. Taxes were duly levied by the town for the fiscal years of 1925 to 1929, inclusive, and this action was brought by the plaintiff to restrain the sale of plaintiff's property for taxes upon the ground that the town of Hamilton Lakes, a municipality, (a) was not a municipal corporation; (b) that the bonds were null and void, and that the street assessments and taxes were also illegal and void.

It further appears from the agreed facts that the town of Hamilton Lakes lies near the city of Greensboro and that the territory included within the corporate limits of said town is well adapted to urban use, and that a total of 1,325 lots have been laid off in the town, and that there are at present 116 property owners. It further appears from said agreed facts that at the time of the issuance of the bonds A. M. Scales was mayor of the town, and his stenographer, Miss Susie M. Gunter, was the secretary and treasurer thereof, and that the commissioners of the town were A. M. Scales, his nephew and attorney, Harry Cobb, and a tenant of A. M. Scales, R. G. Moser, and that neither of the town commissioners except Moser was a resident of the town at said time. Furthermore, it was stipulated that "there were four families living in the corporate limits of the town of Hamilton Lakes, and at the time of the issuance of said street improvement bonds there were five families resident in said corporate limits; that one of these families was R. G. Moser, the tenant of said A. M. Scales; that at present there are fifteen families living in the corporate limits of said town."

The cause was heard by the court by consent upon the facts agreed upon by the parties. The court was of the opinion "that the town of Hamilton Lakes was at the time of the institution of this action, and still is a validly organized and existing municipality, and that the bonds referred to in the complaint are valid and binding obligations of said municipality, and that the claim of W. F. and S. B. Zeigler, trading as Zeigler Brothers, is a valid and binding obligation of said municipality." Thereupon the restraining order was vacated and the action dismissed. From judgment so rendered the plaintiff appealed.

E. S. Parker, Jr., and W. H. Holderness for plaintiff.
A. C. Davis for defendant, Zeigler Brothers.
Manly, Hendren & Womble for defendant.

BROGDEN, J. (1) Was the town of Hamilton Lakes a duly created and organized municipality?

(2) Are the bonds issued by the municipality valid?

The municipality was created by chapter 161 of the Private Laws of 1925. The act established the boundaries of the town and provided that the corporate powers thereof should be vested in and exercised by a mayor, town council and town manager, etc. The act further provided for the establishment of a public school system and for elections as provided by law. The council was empowered to license, tax and regulate trades, occupations and to condemn lands, pass ordinances and fix rates for public service corporations, to levy and collect taxes on real and personal property within the corporate limits, pass ordinances for the collection of taxes, to establish and maintain a fire department and a police force, and to grade, pave and repair streets and sidewalks and make such improvements thereon as it might deem best for the public good, etc.

The Constitution does not restrict the power of the Legislature to create a municipal corporation and to define its territory. These matters are within the discretion of the lawmaking body. *Penland v. Bryson City,* 199 N. C., 140, 154 S. E., 88; *Chimney Rock v. Lake Lure,* 200 N. C., 171, 156 S. E., 542. Governmental and municipal powers are specifically delegated to the municipality with minuteness of detail and comprehensiveness of function. Indeed, this phase of the case is not extensively debated in the briefs of counsel, and it was stipulated that the municipality had been organized under the provisions of chapter 161 of the Private Laws of 1925 after due notice as required by law. Consequently the first question of law must be answered in the affirmative.

The real controversy in the case involves the validity of the bond issues and the levying of taxes to pay the same. The bond issues are attacked upon two lines: First, that the bonds are not necessary expenses of the town of Hamilton Lakes within the purview of Article VII, section 7, of the Constitution of North Carolina; and second, that the obligations were issued without a vote of the people, as contemplated in said section. It is contended that there was no necessity for grading and paving streets and sidewalks or for installing water and sewer systems for the benefit of four or five families living upon a farm of approximately 1,400 acres. It is further contended that the expression "necessary expenses" of a municipality must have some relation to public benefits for a substantial number of persons, and that the constitutional provision has no application to land speculations and subdivisions of a suburban farm. However, an examination of the legal question involved must begin with the assumption that the town of Hamilton Lakes is a municipal corporation, duly organized and created and endowed by the sovereign with specific governmental powers. The population of a designated territory imposes no limitation upon the lawmaking power in creating municipalities. If the town of Hamilton Lakes is a municipal corporation, it had the power by legislative authority to issue bonds for necessary expenses. "The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of 'necessary expense.' The governing authorities of the municipal corporations are vested with the power to determine when they are needed, and, except in cases of fraud, the courts cannot control the discretion of the commissioners." *Fawcett v. Mt. Airy,* 134 N. C., 125, 45 S. E., 1029. See, also, *Storm v. Wrightsville Beach,* 189 N. C., 679, 128 S. E., 17; *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25. That is to say, the courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality. The pertinent decisions of this Court are all to the effect that water systems, sewer systems and street improvements are necessary governmental expenses of a municipality. Therefore, no vote of the people was required.

The plaintiff further contends that the bonds are void for the reason that there were certain irregularities in the issuance thereof, and particularly that the majority of the commissioners of the town of Hamilton Lakes lived without the corporate limits of the town. This situation was doubtless called to the attention of the Legislature and chapter 98 of the Private Laws of 1927 was duly enacted. This statute expressly validated all the bonds in controversy issued by the town. "The Legislature may ratify and confirm any act which it might lawfully have authorized in the first instance where the defect arises out of the neglect of some legal formality and the curative act interferes with no vested right." *Sechrist v. Commissioners,* 181 N. C., 511, 107 S. E., 503; *Brown v. Hillsboro,* 185 N. C., 368, 117 S. E., 41; *Construction Co. v. Brockenbrough,* 187 N. C., 65, 126 S. E., 7. Manifestly, the lawmaking power of the State could authorize the town of Hamilton Lakes to issue bonds for necessary expenses, and also to clothe designated persons with the power to execute same for and in behalf of the municipality. Hence the said bonds of the town of Hamilton Lakes are valid obligations of said municipality.

It appears from the record that the claim of Zeigler Brothers has been reduced to judgment and no discussion of that phase of the case is necessary.

Certain actions were instituted in the United States Court upon certain bonds in controversy, brought by the Ohio Savings Bank and Trust Company *v.* Town of Hamilton Lakes and by the First National Bank of Oak Harbor *v.* the same defendant. The plaintiffs intervened in said action and the cause was finally disposed of by the opinion in the case of *Starmount v. Ohio Savings Bank and Trust Co.,* 55 Fed. (2d), p. 649. This case discusses every phase of the present litigation with clearness and precision and determines the controverted questions adversely to the plaintiff. However, it is not deemed necessary to discuss the effect of the Federal decision as the validity of the bonds must be upheld by application of the principles established in the decisions of this State.

Affirmed.

J. W. STOTT v. SEARS, ROEBUCK AND COMPANY.

(Filed 13 December, 1933.)

1. **Evidence D f—Letters written by plaintiff held competent in corroboration of plaintiff's testimony on controverted fact.**

Where plaintiff's testimony as to the amount he was to receive under a contract of employment is directly challenged by testimony of defendant's general manager, letters written by plaintiff to officers of defendant company relative to the compensation agreed upon are competent in corroboration of plaintiff's testimony, and objections to their admissions on the ground that they contained self-serving declarations will not be sustained, the letters being admitted solely for the purpose of corroborating plaintiff's testimony and not as an admission by defendant of the matters therein contained.

2. **Corporations G c—**

The act of a general manager of a corporation for a large territory in transferring a store manager from one of defendant's stores to another of its stores within the territory and in fixing such store manager's compensation at the new post is binding on the corporation.

APPEAL by defendant from *Cowper, Special Judge,* at June Special Term, 1933, of MECKLENBURG.

Civil action to recover damages for breach of contract of employment.

The defendant operates a number of mercantile establishments throughout the country, and is engaged in a large retail business. One of its stores is located at Charlotte, N. C., which store, prior to 1931, had not proved very satisfactory from the standpoint of profits. New management was desired.

The plaintiff had successfully managed two stores for the defendant, one at Youngstown, Ohio, and the other at Scranton, Pa. His drawing account, or guaranteed salary, as manager of the Scranton store for the year 1931, was $4,200, in addition to which, it was estimated he would receive approximately $4,000 as a bonus, depending upon the net earnings of the company for the preceding year, according to defendant's plan of sharing with managers of its different stores.

On 27 July, 1931, plaintiff was transferred to Charlotte as manager of defendant's store at a guaranteed minimum salary for the year 1932 "of as much as he was making at Scranton," so he alleges and the jury accordingly finds. This was denied by the defendant. On 26 March, 1932, plaintiff was released from the Charlotte store, with assurance that he would hear from F. M. Judson, the former district manager in the north, relative to assignment to another store. Not hearing from Mr. Judson, plaintiff wrote him in regard to another assignment, first on 7 April, 1932, which was followed by correspondence consisting of an exchange of several letters. To the introduction of these letters the defendant objected and excepted.

Plaintiff then exchanged a number of letters with other officers of the defendant company relative to employment at some other point, but which resulted in no further employment. In apt time, the defendant objected to the introduction of this correspondence as containing self-serving declarations, tending to show plaintiff's version of the terms of the contract of employment. Overruled; exception. The court stated to the jury that it was admitted in corroboration of plaintiff's testimony. Some of the letters were written before and some after plaintiff's definite discharge in June, 1932.

The remaining assignments of error relate to prayers for instructions refused, and instructions given.

The jury returned the following verdict:

"I. Did the plaintiff and the defendant enter into a contract by the terms of which the defendant agreed to employ the plaintiff for the year 1932, at a minimum salary of eighty-two hundred dollars ($8,200)? Answer: 'Yes.'

"II. If so, did the defendant wrongfully breach said contract? Answer: 'Yes.'

"III. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$5,648.20.'"

Judgment on the verdict, from which the defendant appeals.

Uhlman S. Alexander and John M. Robinson for plaintiff.
Cansler & Cansler for defendant.

STACY, C. J. The testimony of the plaintiff and that of C. A. Woods, defendant's southern territorial officer, is in direct conflict as to what plaintiff's salary was to be for the year 1932. They both agree that it was to equal his Scranton compensation for the balance of 1931. Therefore, plaintiff's testimony with respect to his compensation for the year 1932, was directly challenged by defendant's witness, C. A. Woods. In this state of the record, it was permissible for plaintiff to offer in evidence the correspondence had between himself and officers of the defendant company, with respect to the terms of the contract of employment, as corroborative of his own testimony. *Allred v. Kirkman*, 160 N. C., 392, 76 S. E., 244; *Burnett v. R. R.*, 120 N. C., 517, 26 S. E., 819.

The case is not like *Leach and Co. v. Peirson,* 275 U. S., 120, 72 L. Ed., 194, and others of similar import, cited and relied upon by defendant, where the plaintiff sought to offer in evidence, as proof of the facts set forth therein, an unanswered letter, written by himself to defendant and containing self-serving declarations, the Court saying in the cited case that the failure to answer such a letter was not tantamount to an admission on the part of the defendant of the truth of the matters and things therein asserted. See Annotation, 8 A. L. R., 1163.

Likewise, the cases of *S. v. Melvin,* 194 N. C., 394, 139 S. E., 762, *S. v. Exum,* 138 N. C., 599, 50 S. E., 283, and *S. v. Parish,* 79 N. C., 610, strongly relied upon by defendant, are not against, but, for the purpose offered, are in support of the admissibility of the evidence now in question.

While not offered for the purpose, it is suggested by plaintiff that this evidence was also competent to show diligence on his part to secure other employment in diminution of loss. *Distributing Corp. v. Seawell, ante,* 359; *Mills v. McRae,* 187 N. C., 707, 122 S. E., 762; *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12.

It is observed that the defendant was allowed to strengthen C. A. Woods' testimony by offering in evidence exchange of letters had between himself and other officers of the defendant company relative to plaintiff's status. The competency of this evidence, as corroborative of defendant's witness, is not questioned, though it may have been *res inter alios acta. Stanley v. Lbr. Co.,* 184 N. C., 302, 114 S. E., 385; *Bryant v. Bryant,* 178 N. C., 77, 100 S. E., 178. The only purpose in mentioning this circumstance is to point out that both sides resorted to and were granted the privilege of offering corroborative evidence. The principle stated in *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232, is not involved.

The authority of C. A. Woods to act for the defendant in transferring plaintiff to the Charlotte store, and in agreeing upon his compensation, while challenged on the record, was properly ruled in favor of such authority. *Lumber Co. v. Elias,* 199 N. C., 103, 154 S. E., 54; *Strickland v. Kress,* 183 N. C., 534, 112 S. E., 30.

The remaining exceptions are not of sufficient merit to warrant a new trial, or to call for elaboration. The verdict and judgment will be upheld.

No error.

W. B. KLANDER v. E. C. WEST.

(Filed 13 December, 1933.)

Execution K a—Execution against the person may not issue upon judgment by default in action for malicious prosecution and abuse of process.

Where judgment is rendered in an action for malicious prosecution and abuse of process by default and inquiry, execution against the person of defendant may not be had upon the verdict of the jury upon the issue of damages, an affirmative finding by the jury of actual malice being necessary for execution against the person on the first cause of action, and wilful abuse of process being necessary on the second.

APPEAL by defendant from *Sinclair, J.,* at March Term, 1933, of NEW HANOVER. Modified and affirmed.

The plaintiff brought suit against the defendant to recover damages for malicious prosecution and wrongful abuse of process. He alleges that in 1924 he bought goods amounting to $29.00 from the Quaker Valley Manufacturing Company, a corporation doing business in the

State of Illinois, and was unable to pay for them; that in June, 1932, the defendant, an attorney resident in the county of Harnett, caused a warrant to be issued charging the plaintiff with the unlawful, wilful and felonious removal, exchange, or secretion of certain personal property on which a lien existed in favor of the Quaker Valley Manufacturing Company, with intent to hinder and prevent the enforcement of said lien; charging him also with the fraudulent use of the United States mails for the purpose of defrauding said corporation; and that he caused the plaintiff to be arrested and tried before a magistrate in Harnett County in a criminal action which was dismissed before the institution of the present suit.

The plaintiff further alleges that the affidavit was sworn to by the defendant before a justice of the peace; that the defendant instituted the prosecution with malice for the purpose of extorting the payment of the debt; that the defendant is guilty not only of the malicious prosecution of the plaintiff but of the malicious abuse of the process of the court for the purpose of forcing the plaintiff by a criminal action to pay the said debt and costs; and that the defendant's malicious prosecution and wilful abuse of the process of the court injured the plaintiff in his character and reputation.

The complaint was verified. The defendant filed no answer, and the clerk of the Superior Court rendered judgment by default and inquiry, and transferred the cause to the civil issue docket for the assessment of damages as provided by law.

At March Term, 1933, an issue was submitted to the jury who assessed the plaintiff's damages at $250.00. It was thereupon adjudged that the plaintiff recover of defendant the sum of $250.00 and the costs of the action; and, further, that, whereas the defendant wilfully, maliciously and wantonly abused the process of the court in causing the arrest and prosecution of the plaintiff, the clerk of the court should issue an execution to the sheriff of Harnett County against the property of the defendant and if the execution should be returned unsatisfied he should issue an execution to the sheriff of Harnett County to arrest the defendant and deliver him to the sheriff of New Hanover County to be held in custody as required by law until the judgment should be paid or the defendant should be discharged.

Defendant excepted and appealed.

Clifford & Williams for appellant.

PER CURIAM. The complaint states alleged causes of action for malicious prosecution and wilful abuse of process. The defendant filed no answer and the clerk gave judgment by default and inquiry. In the

Superior Court the only issue submitted to the jury was directed to the *quantum* of damages and was answered in favor of the plaintiff. It was thereupon adjudged that the plaintiff recover $250.00 and costs and that he have execution against the property of the defendant and upon return of *nulla bona* against the defendant's person. The defendant excepted only to the clause in the judgment which authorized his arrest under execution.

To justify an execution against the person in an action for malicious prosecution there must be an affirmative finding by the jury of express or actual malice. *Watson v. Hilton,* 203 N. C., 574; *Harris v. Singletary,* 193 N. C., 583; *Swain v. Oakey,* 190 N. C., 113, 116.

In an action for abuse of process it is not necessary to show malice, want of probable cause, or termination of the action; the two essential elements are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding. The act must be wilful. *Carpenter v. Hanes,* 167 N. C., 551.

In the absence of a finding of express malice or the wilful abuse of process the person of the defendant cannot be taken in execution. The clause authorizing execution against his person will be stricken from the judgment, and as thus modified the judgment is affirmed.

Modified and affirmed.

C. J. HARRIS v. CABARRUS BANK AND TRUST COMPANY, ADMINISTRATOR, C. T. A., ET AL. EXECUTORS OF THE ESTATE OF ROBERT F. PHIFER.

(Filed 10 January, 1934.)

1. **Brokers A a: Executors and Administrators C c—Ordinarily executor cannot bind estate by brokerage contract to sell at fixed price.**

   An executor of an estate has no power to bind the estate by a brokerage contract with a real estate agent for sale of lands belonging to the estate, unless it is made to appear that such power was given under the will or otherwise, and where there is no evidence that the executor had been given such authority a demurrer is properly sustained in an action against the executor in his representative capacity by the real estate broker to recover commissions for procuring a proposed purchaser upon the terms agreed upon, the real estate broker being chargeable with knowledge of the legal limitations on the executor's authority.

2. **Brokers D a—Seller may not maintain that proposed purchaser could not pay cash in accordance with agreement where deed is not tendered.**

   Where the contract with a real estate agent is that he shall sell lands upon commission at a certain price for cash and he finds a purchaser who agrees to buy at the price fixed, in the agent's action to recover the commission, the question as to whether the proposed purchaser was able and willing to pay the purchase price in cash may not be taken advantage of by the seller where he has not tendered a deed to the lands and has not demanded the cash payment.

CIVIL ACTION, before *Warlick, J.*, at February Term, 1933, of CABARRUS.

It was alleged in the complaint that Robert F. Phifer, of the city of New York, died on or about 16 October, 1928, leaving a last will and testament in which the New York Trust Company and Marshall Phifer Williamson were appointed executors and duly qualified as such, and that the Cabarrus Bank and Trust Company was duly appointed administrator, *c. t. a.* of said Robert Phifer, deceased, by the clerk of the Superior Court of Cabarrus County, North Carolina, and all are now acting in their said capacities.

The evidence tended to show that the plaintiff is a real estate agent in Cabarrus County, and that the law firm of Fletcher & Brown, of New York, were attorneys for the New York Trust Company. Mr. Brown, one of said attorneys, came to Cabarrus County to look over the property of the deceased Phifer. The plaintiff testified that the said attorney Brown employed him to sell certain property situated on South Union Street in Concord, N. C., belonging to said estate. The plaintiff said that as a result of the conference with Brown he undertook to procure customers for the property and as a result secured an offer for the property for the sum of $25,000 cash. This offer was communicated to Brown and in response thereto Brown wrote the following letter to Harris: "*Re* estate of Robert F. Phifer. I have your letter of the 19th inst. The result of my investigation after talking with a number of people in Concord when I was there was that South Union Street property is worth $1,000 a front foot and I consider that $25,000 is an inadequate amount to sell 34 feet for, and I think that we have offered you an exceptionally good proposition in offering to permit you to sell for $26,500. Fletcher & Brown, by A. L. Brown." After receiving the letter of 24 April, 1929, the plaintiff Harris interested Jay Linker in the purchase of the property. The plaintiff and Linker went to the office of the defendant, Cabarrus Bank and Trust Company, and renewed the offer in the presence of W. L. Burns, vice-president of the bank. Thereupon the following telegram was sent to Brown in New York: "In accordance with your letter of 24 April, Mr. Harris has sold remaining Union Street business property for twenty-six thousand five hundred dollars. Shall we confirm? W. L. Burns, vice-president, Cabarrus Savings Bank, Concord, N. C." Brown replied to the telegram on 21 May, 1929, as follows: "Trust Company and Williamson authorize you to sell remaining Union Street property for $26,500 if you recommend sale. A. L. Brown."

The plaintiff heard nothing further from the matter and on 15 June, 1929, wrote a letter to the attorneys, Fletcher & Brown, New York, claiming a commission of five per cent for making the sale, and amounting to $1,325. Linker testified that at the time he went into the office of the defendant, Cabarrus Bank and Trust Company, he understood that the deal was to be a cash transaction, and "at that time I was ready, able and willing to take the property at my offer of $26,500. At that time I was in a financial position to put down a fair deposit in cash. They did not ask for any deposit, so it was not necessary to offer the deposit until the deed was offered for delivery. . . . I did not have the cash that day, but was in a position to get it whenever they delivered the deed." No deed was ever tendered by the defendants to Linker and no demand ever made for the payment of the purchase money.

The following issues were submitted to the jury:

1. "Was the plaintiff, C. J. Harris, authorized by the defendants to act as agent for the defendants in the sale and disposition of the Union Street property at the price of $26,500?"

2. "If so, did the plaintiff, C. J. Harris, find a proposed purchaser at the price of $26,500 for said property?"

3. "Was the proposed purchaser J. B. Linker so found by the plaintiff, C. J. Harris, ready, able and willing to purchase said property at the price of $26,500, according to the terms of the sale?"

4. "What amount, if anything, are the defendants indebted to the plaintiff?"

The jury in response to instructions by the court, answered the first issue "Yes"; the second issue "Yes"; the third issue "Yes," and also answered the fourth issue "$1,325."

From judgment upon the verdict the defendants appealed.

Hartsell & Hartsell for plaintiff.
J. Lee Crowell and J. Lee Crowell, Jr., for defendants.

BROGDEN, J. Is a letter written by the attorneys for the executors of an estate, authorizing a real estate agent to sell land belonging to the estate, sufficient evidence of agency to bind the estate in the absence of proof of either express or implied authority conferred upon the executors to sell and convey real property?

At the outset the plaintiff knew that he was dealing with the representatives of a dead man, and consequently the law imposed upon him the duty of ascertaining the extent of the authority of the parties to dispose of the real estate. The power of personal representatives to contract with respect to real property of decedent is limited and fenced in both by statute and the decisions. Thus in *Hedgecock v. Tate,* 168 N. C., 660, 85 S. E., 34, the Court said: "The plaintiff cannot enforce specific performance of the option, because there is nothing to show, in the first place, that the executors to the will of J. B. Richardson are given power to sell land. Even if they were vested with the power to sell land, it has been held that that does not give the executors any power to give an option to purchase." See *Vaughan v. Farmer,* 90 N. C., 607; *Trogden v. Williams,* 144 N. C., 194, 56 S. E., 865; *Powell v. Woodcock,* 149 N. C., 235, 62 S. E., 1071; Ann. Cas. 1916-D, 410, 448, 449. The will of testator was not offered in evidence. Hence there was nothing to indicate either the express or implied power of the personal representatives to sell land, nor was there any evidence of authority of the attorney to make such a contract except the bare fact that he was representing the executors. He testified: "I was never vested with authority to sell or authorize contracts for the sale of any real estate belonging to the estate of Robert F. Phifer, deceased." The plaintiff said: "I never made any trade with the New York Trust Company or Marshall P. Williamson, the executors of the estate. Have never seen any of the New York Trust Company, but have talked with Mr. Williamson, never talked any business with him only through A. L. Brown."

This suit was brought against the administrator and executors in their representative capacity, and therefore the claim is asserted against the estate and not against the executors personally, upon the theory that they exceeded their authority as agents.

The trial judge instructed the jury as follows: "The court . . . instructs you as a matter of law that if you find the facts to be as the evidence tends to show that you would answer the first issue 'Yes,' finding thereby that the plaintiff, C. J. Harris, was authorized by the defendants to act as agent for the defendants in the sale and disposition of the Union Street property at the price of $26,500."

Interpreted in the light of the foregoing decisions and others of like tenor, the instruction so given was erroneous.

The defendants earnestly contend that there was no evidence that Linker, the proposed purchaser, was ready, able and willing to comply with the agreement. The law is that "a broker, who negotiates the sale of property, is not entitled to his commissions unless he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between him and his principal, the vendor." *Trust Co. v. Adams,* 145 N. C., 161, 58 S. E., 1008; *Hardy v. Ward,* 150 N. C., 385, 64 S. E., 171; *Winders v. Kenan,* 161 N. C., 628, 77 S. E., 687; *Crowell v. Parker,* 171 N. C., 392, 88 S. E., 497; *McCoy v.*

Trust Co., 204 N. C., 721. However, it is to be observed that the offer to sell the property for $26,500 specified no time for the payment of the purchase money, nor did it specify that such money was to be paid in cash at the time of the acceptance of the offer. The letter was no more than a bare agreement to sell the property for the sum stipulated. Consequently, in order for the defendants to take advantage of the "ready, able and willing" doctrine, it was their duty to tender a deed within a reasonable time and demand the price. This they failed to do. Hence they cannot now set on foot an examination as to whether the proposed purchaser had $26,500 in cash in his pocket on the day he appeared at the office of the Trust Company and agreed to purchase the land at that price.

Error.

LEONA YOUNG, ADMINISTRATRIX OF P. R. YOUNG, DECEASED, v. SOUTHERN RAILWAY COMPANY AND J. E. DIVELBISS.

(Filed 10 January, 1934.)

Railroads D c—Administrator may not recover for death of intestate killed when struck by train which he could have seen for 200 yards.

Where there is evidence that defendant's passenger train, coasting down grade at a rapid speed, struck and killed plaintiff's intestate who was crossing defendant's tracks by a foot path, and that the train gave no signal or warning of its approach, but all the evidence tends to show that at the scene of the accident defendant's tracks were built on a fill and that the top of the fill extended level with the tracks for a distance of eight to twelve feet on either side, and that within six to eight feet of the track defendant's approaching train could have been seen for a distance of 200 yards, defendant's motion as of nonsuit is properly allowed.

CIVIL ACTION, before *Alley, J.*, April Term, 1933. From BUNCOMBE.

On 5 November, 1931, about 1:30 p.m., on a clear day the deceased, an old man eighty-eight years of age, undertook to cross the defendant's tracks near Canton. He approached the track on the south side and was walking in a footpath across said track. The roadbed was on a fill eight or twelve feet in height and the path led up to the track. From the west to the point of collision is a steep grade. An eye witness offered by plaintiff said: "He came across from the south side and walked upon the bank. As he got upon the top of the railroad fill he turned and walked with his back to the train down the railroad. The last time I saw him he started across the track—he never did stop—just went right straight across the track—he just kept going with his head kinda down looking this way. He was just walking along and looking in the same direction all the time—he walks pretty glib. . . . He was making the last step off the track on the north side when the pilot beam hit him in the head. . . . I heard the train blow back up the track. . . . If he had looked up the track after he got up the fill, he could have seen the train I feel sure. I have said that all the time. I can't say anything but that. . . . Not a thing to keep you from seeing up the track. . . . I was sitting on a wall in my kitchen yard at the time the accident happened, . . . 150 yards from the place where Mr. Young was hit. . . . From the time I saw him walking up there, walking along, he walked on and never changed his head at all, kept walking the same way all the time. I never saw him turn his head or change it."

The plaintiff offered as a witness a civil engineer, who made a blue print of the surroundings. This witness testified: "That trail led up an embankment about eight feet high. When he got up there he had a space to walk over after he got to the top of the embankment approximately eight or ten feet to the track—that eight or ten feet was level with the top of the fill. . . . When he got within eight or twelve feet of the track, exactly like pointed out to me, the space was perfectly level, and I could see the straight track running east and west. Looking east it is 1,100 feet to the first Wellstown crossing—that was perfectly straight and down grade. The train was not coming in that direction—they told me it was coming in the other direction. Standing in that space—say two feet from the end of the cross tie, where they showed me Mr. Young walked up, looking due west, the way the train was coming, I imagine you could see up that track between two or three hundred yards anyway. A man walking just the way they showed me Mr. Young was walking as he approached the railroad track before he went on the track, if he had looked in the direction the train was coming, could have seen the train at least 200 yards. I could have seen that train in the direction it was coming, I would say 200 yards at any point from the top of the fill to the railroad a distance of eight or twelve feet there, if he had looked in the direction the train was coming. Six or eight feet before he got to the end of the ties he could have seen two or three hundred yards, if he had turned his head and looked in the direction the train was coming. I think that outhouse is the nearest obstruction looking west from the railroad track—it is something like twenty-five feet from the track. . . . This little outhouse sits something like 25 feet south of the track, and sits on lower ground than the track. . . . There is no house, no bushes, no growth of any kind that would obstruct the view of a man from six to eight feet of the track right where Mr. Young went on, looking west for two or three hundred yards . . . at any point six to eight feet before Mr. Young went on the track looking in the direction the train was coming, that would obstruct his view 200 yards. He had to walk the width of the fill six or eight feet before he could go on the track. He could see two hundred yards then after he walked up and got on this bank that was immediately level with the railroad, . . . and if he had looked in the direction the train was coming I am sure that there was no outhouses, no fence, no trees, or anything that would obstruct his view for two hundred yards."

The evidence tended to show that when the engineer of the train reached the top of the cut west of the point of the collision, he cut off the steam and the engine was coasting down grade at a speed of some 35 or 40 miles an hour, and hence not making a lot of noise. There was evidence that no signal was given of the approach of this rapidly moving passenger train.

The engineer and fireman testified that as soon as they discovered that plaintiff's intestate was about to enter upon the track they sounded the whistle, put on the emergency brake, and used every available means to stop the train or slacken its speed. There was no evidence tending to show in what distance this passenger train could have been stopped under the circumstances existing at the time.

The cause was tried in the county court upon issues of negligence, contributory negligence, last clear chance and damages. The jury answered the issue of negligence "Yes"; the issue of contributory negligence "No"; the issue of last clear chance "Yes," and awarded damages in the sum of $2,325.60. The defendant appealed to the Superior Court upon exceptions duly taken. The trial judge overruled certain exceptions so taken by the defendant and sustained others. One exception sustained was for the failure of the judge of the county court to nonsuit the case. Another was to the submission of an issue of last clear chance to the jury in the county court. It was further ordered that the judgment of said county court . . . is hereby set aside and declared null and void, . . . and that a certified copy of this judgment be transmitted to the said General County Court of Buncombe County to the end that judgment may be entered by the said court, dismissing this action as in case of nonsuit. From the foregoing judgment plaintiff appealed.

Harkins, Van Winkle & Walton for plaintiff.
R. C. Kelly and Jones & Ward for defendant.

BROGDEN, J. The evidence tells in substance, the following story: A pedestrian, an old man, walking briskly, in a much used footpath in a populous community, approaches a live track of the defendant at about one o'clock in the daytime. The roadbed was about eight feet high, and at the top of the embankment there was a level space of 8 or 10 feet between the edge of the embankment and the track. When the pedestrian reached a point within eight or twelve feet of the track, he could see 1,100 feet to the eastward and within a distance of six or eight feet from the track he could see to the westward "two or three hundred yards." A passenger train is approaching from the west, coasting down a steep grade at the rate of 30 to 40 miles an hour. The pedestrian, still following the footpath, steps upon the track and in the act of crossing, is crushed by the locomotive, which it is assumed, failed to give proper signals.

The accepted principles of law applicable to the facts preclude recovery. *Davidson v. R. R.,* 171 N. C., 634, 88 S. E., 759; *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307; *Pope v. R. R.,* 195 N. C., 67, 141 S. E., 350; *Bailey v. R. R.,* 196 N. C., 515, 146 S. E., 135; *Krouse v. R. R.,* 197 N. C., 541, 149 S. E., 923; *Tart v. R. R.,* 202 N. C., 52, 161 S. E., 720.

Affirmed.

CAROLINA MORTGAGE COMPANY v. DR. V. M. LONG AND HIS WIFE, HANNAH LONG.

(Filed 10 January, 1934.)

1. **Venue D a—**

A motion for change of venue as a matter of right made before time for filing answer has expired is made in apt time. C. S., 470.

2. **Venue A a—**

Upon a motion for change of venue as a matter of right the nature and purpose of the action is to be determined by the allegations of the complaint and not the prayer for relief.

3. **Pleadings A f—**

The prayer for relief does not narrow or enlarge the relief to which plaintiff is entitled, the relief to which he is entitled being determined by the allegations of the complaint established by evidence.

4. **Venue A a—Where allegations, if established, would entitle plaintiff to foreclosure, action is removable to county in which land lies.**

Where the allegations of the complaint, if established, would entitle plaintiff to judgment for a sum of money and to a decree foreclosing the mortgage on lands securing such sum, the action involves title to real estate, and when the action is brought in the county of the corporate plaintiff's residence, C. S., 469, it is removable as a matter of right to the county in which the land is situate upon defendant's motion aptly made, 463(3), and plaintiff may not defeat the right of removal by failing to pray specifically for a decree of foreclosure where the prayer for relief is for the sum of money and for such other and further relief as plaintiff may be entitled to in law or equity.

STACY, C. J., dissents.

APPEAL by defendants from *Frizzelle, J.*, at September Term, 1933, of WAKE. Reversed.

This action was heard on the motion of the defendants, made in apt time, and as a matter of right, that the action be removed from the Superior Court of Wake County, where it was begun and where it is now pending, to the Superior Court of Forsyth County, for trial.

The defendants contended at the hearing of their motion that it appears from the allegations of the complaint that this is an action for the foreclosure of a mortgage on land in Forsyth County, and that for this reason they are entitled, as a matter of right, to its removal to said county, for trial.

The plaintiff contended, on the other hand, that it appears from its prayer for relief that the action is to recover of the defendants the sum of $2,350.71, with interest from 21 August, 1933, and not for the foreclosure of the mortgage described in the complaint, and that for this reason, the action should be tried in Wake County, where the plaintiff, a corporation organized under the laws of this State, has its principal place of business.

The motion was denied, and the defendants appealed to the Supreme Court.

John N. Duncan and W. G. Mordecai for plaintiff.
Elledge & Wells for defendants.

CONNOR, J. The plaintiff is a corporation, organized under the laws of this State, with its principal place of business in the city of Raleigh, Wake County. The defendants are citizens of this State, and are residents of Forsyth County. The action was begun and is now pending in the Superior Court of Wake County, which is the proper venue for its trial (C. S., 469, *Smith-Douglass Co. v. Honeycutt,* 204 N. C., 219, 167 S. E., 810), unless, as contended by the defendants, the action is for the foreclosure of a mortgage on land in Forsyth County. In that case, the proper venue for its trial is Forsyth County (C. S., 463(3), *Connor v. Dillard,* 129 N. C., 50, 39 S. E., 641), and there was error in the denial of defendants' motion for its removal, as a matter of right, to said county, for trial. The motion was duly made before the time for the filing of an answer to the complaint had expired, and was therefore in apt time. C. S., 470. The motion was not addressed to the discretion of the court, but was denied as a matter of law. The only question, therefore, presented by this appeal is whether there was error in such denial, and the answer to this question depends upon the nature and purpose of the action.

The nature and purpose of an action is to be determined by the allegations of the complaint, and not by the prayer for relief on the facts alleged in the complaint. *Jones v. R. R.,* 193 N. C., 590, 137 S. E., 706. In that case it is said that his prayer is not the measure of the relief to which the plaintiff is entitled upon the allegations of his complaint. The prayer does not narrow or enlarge the relief to which the plaintiff is entitled. He may recover such relief as he is entitled to upon the facts alleged in his complaint, and established by his proof. Therefore, the nature of his action must be determined by the allegations of his complaint, and not by the specific relief for which he prays. *Shrago v. Gulley,* 174 N. C., 135, 93 S. E., 458; *Warren v. Herrington,* 171 N. C., 165, 88 S. E., 139; *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57; *Councill v. Bailey,* 154 N. C., 54, 69 S. E., 760. In the last cited case, which was an action to recover the purchase money for a tract of land, and for the specific performance by the defendant of his contract for the purchase of said land, it is said: "In this case the plaintiff, it is true, asks for a judgment for the purchase money, but he adds a general prayer for such other and further relief as he may be entitled to—that is, not only for a money judgment, but that he may also have full relief according to the facts he has alleged, and within the scope of the case made by his complaint, the allegations of the complaint being sufficient in form and substance to fully warrant a judgment for a specific performance of the contract in every respect, and at least for the declaration of the vendor's lien upon the land, and a direction for a sale thereof to satisfy the debt. Even under the former system, when the two jurisdictions of equity and law were kept separate and distinct, it was settled by actual adjudication and the highest authority that a prayer for general relief covers and includes a prayer for specific performance, or any particular relief permitted under a general prayer, where the statement in the body of the bill was sufficient to authorize the granting of such specific relief."

In the instant case, on the facts alleged in its complaint, the plaintiff prays judgment.

"1. That it recover of the defendants the sum of $2,350.71, with interest thereon from 21 August, 1933;

2. For the costs of the action;

3. For such other and further relief as plaintiff may be entitled to in law or equity."

If the allegations of its complaint are established by its proof at the trial, the plaintiff will be entitled not only to the specific relief prayed for, but also to a decree foreclosing the mortgage executed by the defendants, by which the payment of the sum of $2,350.71, and interest is secured. The land conveyed by the mortgage is in Forsyth County. That county is therefore the proper venue for the trial of the action, and there was error in the denial of defendants' motion for the removal of the action to said county for trial.

Where on the facts alleged in his complaint, the plaintiff is entitled not only to a judgment that he recover of the defendant the amount of his debt, but also to a decree for the foreclosure of the mortgage by which his debt is secured, and the action was begun and is pending in the county in which the plaintiff resides, but the land conveyed by the mortgage is in another county, the plaintiff cannot deprive the defendant of his right, under the statute, to the removal of the action to the county in which the land is situate, for trial, by his failure to pray for a foreclosure of the mortgage, at least, when he prays judgment for his debt, and also for such other and further relief as he may be entitled to, in law or in equity, on the facts alleged in his complaint. If the law were otherwise, the defendant could be deprived of a right conferred by statute (C. S., 463(3), and not resting in the discretion of the court, or dependent upon the arbitrary choice of the plaintiff. In such case, the plaintiff has not surrendered his right to a decree of foreclosure, in the event he recovers judgment for his debt, and may, after the trial, insist upon such right. This the law does not, and ought not to tolerate.

Reversed.

STACY, C. J., dissents.

L. R. STRICKER v. BUNCOMBE COUNTY AND ROBERT C. COLLINS, TAX COLLECTOR FOR BUNCOMBE COUNTY.

(Filed 10 January, 1934.)

Bills and Notes C e—Bona fide purchaser of negotiable instrument obtains good title although the instrument had been stolen from former owner.

The bona fide purchaser of an unregistered municipal bond, negotiable by delivery, the purchase being made for value, without notice, and before maturity from a reputable dealer also without notice, obtains good title thereto although the bond had been stolen from the former owner.

APPEAL by defendants from *McElroy, J.*, at October Term, 1933, of BUNCOMBE. Affirmed.

Controversy without action upon agreed facts.

In Buncombe County taxes were levied against the property of the plaintiff for 1929 in the sum of $416.81 and for 1930 in the sum of $399.60, and were not paid. In consequence certain real estate owned by the plaintiff was sold and the county became the bidder. The plaintiff owned a Buncombe County road and bridge bond. By virtue of Public Laws, 1933, chapter 280, the following sums are payable in bonds of the character and type of that owned by the plaintiff: of the taxes assessed in 1929 the sum of $127.22 and of the taxes assessed in 1930 the sum of $105.26. Prior to 1 July, 1933, the plaintiff made tender of one-half the delinquent taxes above shown, in cash, and in offering to pay the balance thereof he requested that he be allowed to pay the sum of $127.22 of the taxes levied for 1929, and the sum of $105.26 upon the taxes levied for 1930 out of the proceeds of the bond.

The plaintiff purchased for value in due course, from a reputable dealer in municipal bonds, and owned, as above stated, a certain Buncombe County road and bridge bond, of the face value of $1,000, with certain unpaid interest coupons attached. At the time he purchased said bond he had no notice of any defect in title, or any other irregularity with respect to said bond and purchased it for the purpose of using the proceeds thereof in part payment of his own taxes, as authorized by chapter 280 of the Public Laws of 1933, and for the further purpose of selling and assigning any remainder thereof to other persons who desired to acquire bonds, to be applied in payment of taxes, as authorized by said chapter 280.

The bond is payable to "bearer," is negotiable by delivery, and is not registered. The board of county commissioners of Buncombe County, received a warning and notice not to pay said bond, together with other bonds, and by reason of said notice and warning, the defendants declined and refused to accept said bond, or any portion thereof, either principal or interest to be applied on the plaintiff's taxes, or upon those of any other delinquent taxpayer; but said bond would have been accepted for said purpose, or purposes, had not said notice and warning been given, as aforesaid.

The defendants, through their duly authorized attorney, have attempted to communicate with the parties giving said notice and warning, and did forward to the address of said parties notice advising that said bond had been tendered these defendants, and these defendants have received no further notice with respect thereto, but they still decline to accept said bond without a proper adjudication of the court authorizing them to do so.

For the purposes of this action it is agreed that the said bond in question was stolen, together with other securities, from Lillian Van Ostrand, in Hollywood, California, a former owner thereof, but that the plaintiff in this action had no knowledge that said bond had been stolen, and that he paid the full market value of said bond, and purchased the same from a reputable dealer in bonds and securities, who also had no notice that said bond had ever been stolen. It is further agreed that the principal of said bond will not be due until 1 April, 1944.

Upon the foregoing facts the trial court adjudged that the plaintiff may negotiate the bond or apply it in the payment of taxes as if it had not been stolen.

The defendants excepted and appealed.

Clinton K. Hughes for appellants.
J. E. Swain for appellee.

ADAMS, J. It is elementary law that one who finds a lost chattel, although it has not been abandoned, is entitled to possession against all persons except the true owner. With respect to the loser the title is unaffected by the mere incident of loss and he may reclaim his property from the finder.

To this rule there is a generally recognized exception if the property consists of negotiable securities. Although the thief or finder of a negotiable instrument can acquire no title against the real owner, still, if the instrument be endorsed in blank or be made payable to bearer, a third party acquiring it from the thief or finder, bona fide, for a valuable consideration, before maturity and without notice of the loss, may retain it as against the true owner upon whom the loss falls. Calvert's Daniel on Negotiable Instruments (7th ed.), section 1731.

To a large extent negotiable securities take the place of money. "It would be most embarrassing therefore," it is said, "if every taker of such paper was bound, at his peril, to inquire into the title of the holder, and if he was obliged to take it with all the imperfections and subject to all the defenses which attach to it in the hands of the holder. It has, therefore, become the settled rule that a thief or any other person having possession of such paper fair upon its face can give a holder in due course a good title to it against all the parties thereto as well as the true owner. It may be taken to be the well settled rule of law that the transfer of stolen commercial paper, negotiable by delivery, to a bona fide purchaser for value, without notice and before maturity, vests him with a good title against the world." 3 R. C. L., Bills and Notes, sec. 210.

There is abundant authority in support of the judgment. *Murray v. Lardner,* 2 Wall., 110, 17 L. Ed., 857; *Hotchkiss v. Nat. Shoe and Leather Bank,* 21 Wall., 354, 22 L. Ed., 645; *Morgan v. United States,* 113 U. S., 476, 28 L. Ed., 1044; *Crittenden v. Widrevitz,* 272 Fed., 871; *Murray v. Wagner,* 277 Fed., 32; *Pratt v. Higginson,* 230 Mass., 256, 1 A. L. R., 714, and annotation; *Hancock v. Empire Cotton Oil Co.,* 86 S. E. (Ga.), 434. Judgment

Affirmed.

CHICAGO PORTRAIT COMPANY v. H. V. FURCHES AND J. G. MILLER.

(Filed 10 January, 1934.)

1. **Account Stated B a—Parties held concluded by signed statement admitting amount due on account.**

   Where the evidence is to the effect that the principal debtor, after examining the account between the parties, signed a statement declaring the amount due by him thereon to be in a certain sum, his signature being affixed in the presence of one of his sureties acting with the consent and approval of the other surety, and there is no allegation of fraud or mistake in the signing of the statement, the parties are bound by the signed statement admitting the amount due, and the creditor is entitled to judgment for such amount.

2. **Principal and Surety C c—Principal may apply funds due by creditor to account not covered by surety contract.**

   Where, with the consent of the principal debtor, certain sums due him by the creditor are applied without the knowledge or consent of the debtor's sureties to an old account not covered by the surety contract, the sureties are not entitled to have the account for which they are secondarily liable credited with said sums, such sums belonging to the debtor and he being entitled to apply them as he pleased.

CIVIL ACTION, before *Warlick, J.,* at March Term, 1930, of IREDELL.

The plaintiff employed as a salesman of its products Allen Richard Miller. It required the salesman to have executed a certain letter of credit, guaranteeing the faithful performance of the contract and "payment to you of any and every sum of money collected by or paid to him. The repayment to you of any and every advance of money made to him by you or your agents. The proper and true accounting to you for all portraits, frames, samples, and other merchandise that may come into his possession or control from time to time," etc. The defendants, Miller and Furches, signed said letter of credit and thereby obligated themselves to answer for the default of their principal, Richard Miller, and for each and every "sum of money collected by or paid to him."

Richard Miller entered upon his employment and on 23 July, 1932, the plaintiff claimed that the said Miller owed a balance of $540.28, and on said date the said Richard Miller, in the presence of the defendant, J. G. Miller, signed a statement as follows: "23 July, 1932. Chicago Portrait Company, Gentlemen: I acknowledge receipt of statement of my account as district manager with the Chicago Portrait Company up to and including 30th day of June, 1932, showing a debit balance of $540.28. Remarks: I have checked same carefully and find it correct with the exception of items noted under 'Remarks.' Signed Richard Miller." No exceptions were noted. There was undisputed evidence that the superintendent of collections of the plaintiff notified the defendants of the amount claimed to be due by the plaintiff, and both of said defendants agreed that J. G. Miller meet an agent of plaintiff in Washington and go over the account. Subsequently J. G. Miller and Richard Miller met in Washington and went over the account, and thereupon the said Richard Miller signed the statement referred to.

The defendants filed an answer denying any failure on the part of Richard Miller to perform the duties of his employment or that he was indebted to the plaintiff in any amount. At the trial evidence was offered tending to show that three items amounting to $81.66 due Richard Miller by the plaintiff company, had been credited by and with the consent and approval of Richard Miller to an old account not covered by the letter of credit. There was also undisputed evidence to the effect that J. G. Miller, after the amount of the account had been agreed upon by Richard Miller, proposed to pay the same at the rate of $20.00 per month.

At the conclusion of the evidence the trial judge instructed the jury to answer the issue of indebtedness in the sum of $540.28. From judgment upon the verdict the defendants, J. G. Miller and H. V. Furches, appealed.

P. P. Dulin for defendants.
Scott & Collier for plaintiff.

BROGDEN, J. Richard Miller, in the presence of his codefendant, J. G. Miller, after examining the account, signed a statement declaring that there was a balance due of $540.28. The undisputed evidence tended to show that J. G. Miller was present at the interview with the consent and approval of his codefendant, H. V. Furches. There was no allegation of fraud or mistake in the pleadings, and no evidence thereof. Thus the principle applicable was stated in *Morganton v. Millner,* 181 N. C., 364, 107 S. E., 209, as follows: "There is, however, another principle equally wholesome, and as fully established with us that where men who have had business dealings with each other have come to a full accounting and settlement purporting to cover the transactions between them, such adjustment has the force and effect of a contract, and may not be ignored or impeached except by action in the nature of a bill in equity to surcharge or falsify the account for fraud or specified error." See, also, *Commissioners v. White,* 123 N. C., 534, 31 S. E., 640; *Davis v. Stephenson,* 149 N. C., 113, 62 S. E., 900; *Richardson v. Satterwhite,* 203 N. C., 113, 164 S. E., 825.

The defendants make the point that certain sums of money due Richard Miller were allowed as credit on an old account without their knowledge or consent. However, this money belonged to Richard Miller, and he, of course, had a right to dispose of it as he pleased.

Affirmed.

ROY C. WHITEHURST, ET AL., v. ROY BOWERS.

(Filed 10 January, 1934.)

Deeds and Conveyances C c—Deed in this case held to convey fee simple by application of rule in Shelley's case.

A deed to "W., his lifetime and then to his heirs, if his heirs has no bodily heirs at their death the land returns back to" the grantor, with habendum clause "to said W., his lifetime and then to his heirs and assigns to their only use and behoof forever," with warranty clause in like tenor, conveys the fee-simple title to W. by application of the rule in *Shelley's case,* which applies in this State as a rule of property as well as a rule of law.

APPEAL by defendant from *Frizzelle, J.,* at Chambers, Snow Hill, 13 May, 1933. From PITT.

Controversy without action submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey to defendant a certain tract of land in Pitt County, duly executed and tendered a deed therefor and demanded payment of the purchase price as agreed, but the defendant declines to accept the deed and refuses to make payment, claiming that the title offered is defective.

The court being of opinion, on the facts agreed, that plaintiffs were able to convey a good and sufficient fee-simple title, gave judgment for the plaintiffs, from which the defendant appeals.

Dink James for plaintiffs.
J. H. Spain for defendant.

STACY, C. J. On the hearing, the sufficiency of the title offered was made to depend upon the construction of the following clauses in a deed from R. R. Whitehurst and wife to J. H. W. Whitehurst:

Granting clause: "to said J. H. W. Whitehurst, his lifetime and then to his heirs, if his heirs has no bodily heirs at their death the land returns back to R. R. Whitehurst or nearest heirs."

Habendum clause: "to the said J. H. W. Whitehurst, his lifetime and then to his heirs and assigns to they only use and behoof forever."

Warranty clause: "And the said R. R. Whitehurst and wife, G. A. Whitehurst, for theyselves and they heirs, executors and administrators, covenants with said J. H. W. Whitehurst, his lifetime and then to his bodily heirs, if none at his death, then land returns back to R. R. Whitehurst, or nearest heirs."

The case states that J. H. W. Whitehurst died intestate in October, 1928, not having disposed of the land in question, and leaving him surviving five children, plaintiffs in the present controversy without action.

Did the plaintiffs inherit from their father, or did they take such an estate under the deed to him, as to enable them to convey a fee-simple title to the defendant? The answer is, Yes.

It would seem that by virtue of the operation of the rule in *Shelley's case,* which obtains in this jurisdiction not only as a rule of law but also as a rule of property, J. H. W. Whitehurst took a fee-simple title to the *locus in quo* under the deed from R. R. Whitehurst and wife. *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60; *Martin v. Knowles,* 195 N. C., 427, 142 S. E., 313; *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25; *Benton v. Baucom,* 192 N. C., 630, 135 S. E., 629; *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501. This was the view of the trial court, and we agree with his decision.

We took occasion to examine the rule in *Shelley's case,* somewhat extensively, in the cases just cited, and it would serve no useful purpose to elaborate it further upon the facts of the present record. That its application is attracted by the limitations in the deed presented for construction seems too plain for debate.

It is agreed that the only question for decision is whether the plaintiffs are able to convey a fee-simple title to the *locus in quo.* They are.

Affirmed.

LEWIS FIELDS, AN INFANT, BY SUSIE B. FIELDS, HIS NEXT FRIEND, v. GROVER C. BROWN.

(Filed 10 January, 1934.)

Automobiles D c—Evidence of father's negligence in allowing son under sixteen years of age to drive truck held sufficient for jury.

Evidence that a father allowed his son under sixteen years of age to drive his truck, that the father had been told that the son was a reckless driver, and that the son while driving the truck to a certain destination as instructed by his father, drove carelessly and recklessly, resulting in an accident and injury to a gratuitous guest riding in the truck, is held properly submitted to the jury in the guest's action against the father to recover for the damages sustained.

CIVIL ACTION, before *Daniels, J.,* at January Term, 1933, of WARREN.

The evidence tended to show that the plaintiff, a young man about twenty years of age, was riding as a gratuitous passenger or guest in a truck owned by the defendant and driven at the time by his son, Thurston Brown, who was under sixteen years of age. The evidence further tended to show that the truck approached a car traveling in the same direction while both cars were approaching a curve. The plaintiff said: "You could not see around the curve on our right-hand. . . . On the left side there was just a deep fill about six or seven feet deep. . . . The car in front of us was going in the same direction Thurston Brown was going. Thurston tried to pass the other car, but did not blow, and about the time he tried to pass he turned over down that hill. Thurston didn't blow his horn and the man in front did not turn out. In my opinion Thurston didn't have room to get by. He was going about thirty-five or forty miles an hour. Thurston was just in the start of the curve when he started to pass the other car. He never got by the other car but turned over just as he got beside it. The left-hand wheel ran off in the fill and after the truck ran off it turned over two times to my remembrance.".

The plaintiff sustained a broken leg and other serious and permanent injuries. Issues of negligence and damages were submitted to the jury and answered in favor of the plaintiff, awarding $450.00 damages. From judgment upon the verdict the defendant appealed.

Polk & Gibbs for plaintiff.
Julius Banzet and Frank Banzet for defendant.

BROGDEN, J. The defendant, Grover C. Brown, owned a truck. He directed his son, a boy less than sixteen years of age, to take the truck and carry Peter Williams and Tom Davis to Warrenton. The plaintiff was riding in the truck as a guest. There was evidence that in carrying out the instructions of the father the son operated the truck in a careless and negligent manner, thereby causing the same to leave the road, turn over and inflict serious and permanent injuries upon the plaintiff. A witness for plaintiff testified: that prior to the injury he had notified the defendant that his son drove too fast. The language used by this witness discloses a striking figure of speech which adds materially to the richness of metaphors. He said: "I told him I thought it would be better to learn one of his girls to drive instead of letting Thurston drive, and that if he didn't I thought he would have a hole cut in his family."

The trial judge ruled correctly in submitting the cause to the jury. *Eller v. Dent,* 203 N. C., 439, 166 S. E., 330.

There are certain exceptions to the charge, but they are not sustained as the instructions are fully warranted by the decisions in *Eller v. Dent, supra,* and *Dreher v. Divine,* 192 N. C., 325, 135 S. E., 29.

No error.

STATE v. CHARLIE P. ROWLAND.

(Filed 10 January, 1934.)

1. **Husband and Wife G d—**

Where defendant admits that he abandoned his wife, and the evidence is conflicting as to whether such abandonment was wilful, the case is properly submitted to the jury in a prosecution for wilful abandonment.

2. **Criminal Law L e—**

Where it does not appear of record what the testimony of witnesses would have been if they had been allowed to testify, exceptions to the exclusion of their testimony will not be considered.

3. **Criminal Law G q—In prosecution for abandonment testimony of husband that wife had admitted pregnancy at time of marriage is incompetent.**

In a prosecution for wilful abandonment, testimony of the husband as to admissions or declarations of the wife made to him that she was pregnant at the time of their marriage, offered on the issue as to whether the abandonment was wilful, is incompetent, and in this case the husband obtained the benefit of this contention by other testimony admitted without objection.

APPEAL by defendant from *Warlick, J.,* at May Term, 1933, of ROWAN. No error.

Attorney-General Brummitt and Assistant Attorney General Seawell for the State.

C. P. Barringer for defendant.

ADAMS, J. The defendant was indicted in two counts charging him with the wilful abandonment of his wife and the wilful neglect and refusal to provide adequate support for his wife and their children while they were living together. The jury returned a general verdict finding the defendant guilty on both counts, and from the judgment pronounced he appealed to this Court.

Upon his cross-examination the defendant admitted that he had not provided a home for his wife or contributed anything to her support, and in effect that he had abandoned her, his defense being that the abandonment was not wilful. As the evidence was conflicting the case could not properly have been withdrawn from the jury.

The second, fourth, and fifth exceptions relate to the exclusion of evidence, but as the answers to the several questions are not revealed the exceptions are not meritorious. For aught that appears the answers may have been unfavorable to the appellant. *Snyder v. Asheboro,* 182 N. C., 708; *Barbee v. Davis,* 187 N. C., 78; *New Bern v. Hinton,* 190 N. C., 108.

Declarations or admissions of the wife alleged to have been made to the defendant as to her condition at the time of her marriage were incompetent; but the defendant testified that he "learned of her condition of being pregnant" at that time and that he left her for this reason. He, therefore, had the benefit of this circumstance in reference to the question whether his abandonment was wilful.

There was no error in the charge or in denying the motion to arrest the judgment or to set aside the verdict.

No error.

STATE v. LEROY GOFF, T. E. GOFF, JR., AND MRS. T. E. GOFF, SR.

(Filed 10 January, 1934.)

1. **Criminal Law L d—**

The record on appeal imports verity.

2. **Courts B e—After appeal is perfected from recorder's court and appeal bond given, recorder has no power to allow withdrawal.**

After an appeal from a recorder's court to the Superior Court has been effected and appeal bond given, the recorder's court has no further jurisdiction over the case, the procedure being the same as upon appeal from a justice of the peace, C. S., 4647, and defendant appellant may not thereafter withdraw the appeal by notice given in the recorder's court.

3. **Criminal Law F e—Where appeal from recorder's court is effected and case pending plea of former jeopardy in Superior Court is bad.**

Where defendant has effected an appeal from conviction in a recorder's court and has filed appeal bond, he may not withdraw the appeal in the recorder's court, and his plea of former conviction upon trial in the Superior Court, based upon conviction in the recorder's court and withdrawal of appeal therefrom by the recorder, is bad, the case being in the Superior Court for trial *de novo* on the charge contained in the warrant issued in the recorder's court.

4. **Courts A c—On appeal from conviction in recorder's court Superior Court's jurisdiction is derivative and trial must be had on warrant.**

Where an appeal is taken from a conviction in a recorder's court in a case within its jurisdiction, the jurisdiction of the Superior Court on appeal is derivative, and the defendants must be tried on the warrant as issued out of the recorder's court, and it is error for the Superior Court to try them on an indictment charging a different offense from that contained in the warrant, the discretionary power of the Superior Court to allow an amendment to the warrant being limited to amendments not effecting a change in the charge of the offense. The warrant in this case charged assault and battery on a female, and the indictment charged assault and battery inflicting serious injury. C. S., 4215.

APPEAL by defendants, LeRoy Goff and T. E. Goff, Jr., from *Cranmer, J.,* and a jury, at September Term, 1933, of NEW HANOVER. Remanded.

"This is a criminal action charging that the defendants, LeRoy Goff, T. E. Goff, Jr., and Mrs. T. E. Goff, Sr., did unlawfully and wilfully beat and assault Mrs. T. E. Goff, Jr., and inflict upon the said Mrs. T. E. Goff, Jr., serious injury, by reason of severe and painful abrasions and contusions on the arms, legs and body as per bill of indictment set out in the record, returned as a true bill, at the July Term, 1933, of the Superior Court of New Hanover County.

The following is a true copy of the warrant which the defendants were tried on and convicted in the recorder's court: 'Nos. 961 and 962—State *v.* Tom Goff, LeRoy Goff. The recorder's court of New Hanover County. On this 25th day of June, 1933, before W. T. Hansley, deputy clerk recorder's court of New Hanover County, personally appeared Mrs. T. E. Goff, Jr., and made oath in due form that on 24 June, 1933, and in the county of New Hanover, Tom Goff, and LeRoy Goff, did unlawfully and wilfully assault her by beating her with his hands and did kick her, she a female and he a male over 18 years of age, against the form of the statute in such cases made and provided, and against the peace and dignity of the State. Mrs. T. E. Goff, Jr., affiant. Sworn to and subscribed before me, this 25 June, 1933. W. T. Hansley, deputy clerk recorder's court, New Hanover County.' "

A warrant for the arrest of Tom Goff and LeRoy Goff was duly issued and the case set for 10:00 a.m. 26 June, 1933, before the recorder's court of New Hanover County, N. C.

"Continued 6–27–33; bond $200.00, T. E. Goff, Sr., surety. Judgment open 6–30–33—7–7–33, guilty fined $25.00 and costs. Judgment suspended during twelve months good behavior and on payment of costs.

On 7 July, 1933, notice of appeal to the Superior Court was given and bond fixed and given in the sum of $100.00, with T. E. Goff, Sr., as surety.

Appeal withdrawn in open court 7–14–33; costs $8.05 paid, on 4 August, 1933, as to LeRoy Goff and costs, as to Tom Goff has not yet been paid."

At the July Term, Superior Court, 1933, beginning 24 July, 1933, the grand jury returned the following bill of indictment: "State of North Carolina, New Hanover County—Superior Court, July Term, 1933. The jurors for the State upon their oath, present, that Tom Goff, LeRoy Goff and Mrs. T. E. Goff, Sr., late of the county of New Hanover, on 24 June, 1933, with force and arms, at and in the county aforesaid, did unlawfully and wilfully beat and assault Mrs. T. E. Goff, Jr., and inflict upon the said Mrs. T. E. Goff, Jr., serious injury by reason of severe and painful abrasions and contusions upon the arms, legs and body of Mrs. T. E. Goff, Jr., caused by kicks and other blows struck by the said defendants, Tom Goff, LeRoy Goff and Mrs. T. E. Goff, Sr., against the form of the statute in such case made and provided, and against the peace and dignity of the State. KELLUM, *Solicitor.*"

At the September Term, 1933, the defendants were tried in the Superior Court upon the above bill of indictment, before his Honor, E. H. Cranmer, judge, and a jury. The defendants stated to the court that they had been formerly tried and convicted of assault and battery upon the said Mrs. T. E. Goff, Jr., upon this case being called for trial; that upon judgment being pronounced in said recorder's court on 7 July, 1933, the defendants, Tom Goff and LeRoy Goff, appealed to the Superior Court of New Hanover County, immediately executed and delivered their appearance bond to said Superior Court beginning 24 July, 1933. This appeal was docketed in the Superior Court of said county on 8 July, 1933. While said appeal was pending in the Superior Court of said county on 14 July, 1933, said defendants appeared in the recorder's court and stated that they desired to withdraw the appeal they had taken on 7 July, 1933, to the Superior Court, at which time the recorder directed the entry to be made: "Appeal withdrawn in open court." LeRoy Goff paid the costs of $8.05 on 4 August, 1933. Tom

Goff had not paid any part of the costs. "It further appearing to the court that at the Superior Court beginning and held in and for said county on 24 July, 1933, the bill of indictment above set out was duly returned by the grand jury, and on 27 July, 1933, a capias issued out of said court for said defendants and on 31 July, 1933, said defendants were arrested and executed an appearance bond returnable to the September Term of said Superior Court beginning 11 September, 1933."

The court held, on the admission of the defendants and the record as herein set out, that the State should proceed with the trial of said case, at which time LeRoy Goff said he desired to recover the $8.05 he had paid to the recorder's court. The defendants each pleaded former conviction, and in Superior Court were without counsel. Upon the record, the plea was overruled, the bill charging serious injury, which was not in the charge in recorder's court. Each defendant excepted. The trial then proceeded, resulting in a verdict as charged in the bill of indictment, upon which the court entered judgment:

"That judgment be suspended as to the defendants, Mrs. T. E. Goff, Sr., upon payment of one-third of the costs. The defendants, LeRoy Goff and T. E. Goff, Jr., were each sentenced to 18 months in jail, to be assigned to work on the State highway, as per judgment of the court as shown in the record." After the verdict and judgment, the defendants, LeRoy Goff and T. E. Goff, Jr., gave notice of appeal in open court to the Supreme Court.

The appealing defendants made several exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

Nathan Cole and W. F. Jones for defendants.

CLARKSON, J. The record discloses that the case on appeal was settled by the court below upon disagreement of counsel. Numerous opinions of this Court are to the effect that the record to this Court imports verity and we are bound by it.

The first exception and assignment of error made by appellants is as follows: "His Honor was in error in not sustaining the plea of former conviction of defendants and ordering them discharged." We see no error in the court below in not sustaining the plea of former conviction.

In the record is the following: "Judgment being pronounced in said recorder's court on 7 July, 1933, the defendants, Tom Goff and LeRoy Goff, appealed to the Superior Court of New Hanover County, immediately executed and delivered their appearance bond to said Superior

Court beginning 24 July, 1933. This appeal was docketed in the Superior Court of said county on 8 July, 1933. While said appeal was pending in the Superior Court of said county on 14 July, 1933, said defendants appeared in the recorder's court and stated that they desired to withdraw the appeal they had taken on 7 July, 1933, to the Superior Court, at which time the recorder directed the entry to be made: 'Appeal withdrawn in open court.' LeRoy Goff paid the costs of $8.05 on 4 August, 1933. Tom Goff had not paid any part of the costs."

Under the above facts appearing in the record, the defendants, appellants, could not withdraw their appeal. The presumption from the record is that the recorder sent all the necessary papers to the Superior Court, where they were duly docketed. An appearance bond for appellants was duly given.

C. S., 4647, is as follows: "The accused may appeal from the sentence of the justice to the Superior Court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings." C. S., 4648, *et seq.*

In *Sneeden v. Darby,* 173 N. C., 274 (275), speaking to the subject: "The act establishing the recorder's court in Wilmington, chapter 389 (398) of Public Laws of 1909, as amended by ch. 217 of the Public-Local Laws of 1911, provided that 'Any person desiring to appeal to the Superior Court in a criminal or civil case from a judgment of the recorder's court shall be allowed to do so in the same manner as is now provided for appeals from the courts of justices of the peace'; and section 608 of the Revisal requires an appeal from a justice to the Superior Court to be docketed 'at the ensuing term of said court.' "

35 C. J., part sec. 481(b), p. 786, is as follows: "When the jurisdiction of the appellate court has attached on appeal from a justice's court the powers of the justice are in general at an end, or suspended during the pendency of the appeal, except in so far as may be necessary to transmit the record to the appellate court. After the appeal is perfected, the justice has no power to vacate." *Marshall v. Lester,* 6 N. C., 227; *Sturgill v. Thompson,* 44 N. C., 392; *Forbes v. McGuire,* 116 N. C., 449; *Bagging Co. v. R. R.,* 184 N. C., 73.

In 16 R. C. L., part sec. 83, (Justices of the peace), p. 405-6, we find: "When an appeal has been taken the authority of the justice over the case is thereby terminated, and he has no power to take any further steps therein except such as may be necessary to perfect the appeal.

Hence he cannot issue an execution after an appeal has been perfected, and if he issues execution on a judgment within the time allowed for an appeal, and the appeal is taken afterwards, it is his duty to revoke the execution, and the constable is bound to return the execution and proceed no further upon it, for an appeal strikes the execution dead, and everything done afterwards in the way of levy or sale under it is void. Likewise in a criminal case the justice's issuance of a *mittimus* on a sentence is without jurisdiction and void after an appeal has been taken. Where the effect of an appeal is to transfer the entire record to the appellate court for a retrial as though originally brought therein, the judgment appealed from is completely annulled, and is not thereafter available for any purpose."

In *Bullard v. McArdle,* 35 Am. St. Rep. (96 Cal., 355), 176 (178), speaking to the subject: "By perfecting the appeal from the justice's court the case was entirely removed from that court, and only the Superior Court had thereafter jurisdiction in the matter. The judgment in the justice's court was not merely suspended, but by the removal of the record was vacated and set aside. *Thornton v. McHoney,* 24 Cal., 569; *People v. Treadwell,* 66 Cal., 400. When the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court as if originally brought therein, as is the case when appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not thereafter available for any purpose. *Bank of North America v. Wheeler,* 28 Conn., 441; 73 Amer. Dec., 683; *Campbell v. Howard,* 5 Mass., 376; *Levi v. Karrick,* 15 Iowa, 444; *Keyser v. Farr,* 105 U. S., 265." C. S., 660, appeal from justice heard *de novo.* 1528, *et seq.* In civil actions: See C. S., 650, undertaking to stay execution money judgment; C. S., 651, 652, 653, 654, 655, 656, 657, judgment not vacated by stay.

On appeal to the Superior Court from a conviction before a justice of the peace, the court can allow an amendment of the warrant. *S. v. Cauble,* 70 N. C., 62; *S. v. Koonce,* 108 N. C., 752. It is discretionary with the court whether it will exercise the power. *S. v. Vaughan,* 91 N. C., 532; *S. v. Crook,* 91 N. C., 536. But a warrant cannot be amended so as to charge a different offense. *S. v. Cook,* 61 N. C., 535; *S. v. Vaughan,* 91 N. C., 532; *S. v. Taylor,* 118 N. C., 1262; *S. v. Johnson,* 188 N. C., 591; *S. v. McLamb,* 188 N. C., 803; *S. v. Pace,* 192 N. C., 780; *S. v. Hunt,* 197 N. C., 707. What is "serious damage" or "serious injury" see *S. v. Hefner,* 199 N. C., 778 (780).

An appeal having been taken by the defendants, they were entitled to a trial *de novo* on the charge contained in the warrant, on which the appeal was taken.

The second exception and assignment of error by appellants as to submitting the question of guilty or not guilty to the jury, under the bill of indictment, must be sustained.

C. S., 4215, is as follows: "In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both at the discretion of the court. *Provided,* that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to case of assault or assault and battery by any man or boy over eighteen years old on any female person."

Public Laws, 1909, chap. 398, establishes a "recorder's court of New Hanover County." This act was amended by Public-Local Laws, 1911, chap. 217, which conferred civil jurisdiction. It was further amended as follows: Section 3. "Amend section eight of chapter three hundred and ninety-eight of the Public Laws of one thousand nine hundred and nine, by striking out all of subsection (c) of said section eight and insert in lieu thereof the following: (c) Said court, in addition to the jurisdiction conferred in subsections (a) and (b) of this section, shall have final, exclusive, original jurisdiction of larceny and receiving stolen goods, knowing them to be stolen, where the property stolen does not exceed twenty dollars in value, and exclusive original jurisdiction of all other criminal offenses committed in said county below the grade of felony, as now defined by law, and the same are hereby declared to be petty misdemeanors; *Provided, however,* the grand jury of the Superior Court of said county shall have the right, and it is hereby authorized so to do, to summons witnesses before and inquire into the commission of any of the offenses declared by this subsection to be petty misdemeanors, but in the event that any presentment is made or a true bill found, it shall be the duty of the judge of the Superior Court to remand said cases to the recorder for trial as is prescribed by law: *Provided, further,* that if the recorder's court shall not take official cognizance of any offenses whereof it is given exclusive original jurisdiction within sixty days after the commission of the offense, the Superior Court shall have jurisdiction of such offense, concurrently with the recorder's court. Section 4. Amend section eight of chapter three hundred and ninety-eight of the Public Laws of North Carolina of one thousand nine hundred and nine, by adding at the end thereof the following: (d) 'Any person desiring to appeal to the Superior Court, in a criminal or civil case, from a judgment of the recorder's court, shall be allowed to do so in the same manner as is now provided for appeals from the courts of justices of the peace. (h) . . . and in all cases there shall be a right to appeal on the part of the defendant in the trial of criminal cases and on the part of either the plaintiff or defendant in civil cases to the ensuing term of the Superior Court, and in all such cases of appeal the defendant in a criminal action shall be required to give bond, with sufficient surety, to be fixed by the said recorder, conditioned for the defendant's appearance at such court, and in default thereof the recorder shall commit such defendant to the common jail of New Hanover County until said defendant shall give bond or be otherwise discharged according to law.' " See Public-Local Laws (Extra Session) 1920, chap. 179; Public-Local Laws, 1921, chap. 2; Public Laws, 1923, chap. 132.

Under the above, the recorder's court of New Hanover County "shall have final, exclusive, original jurisdiction of larceny . . . and exclusive original jurisdiction of all other criminal offenses committed in said county below the grade of felony, as now defined by law and the same are hereby declared to be petty misdemeanors." In the proviso the Superior Court is given concurrent jurisdiction if the recorder's court does not take official cognizance of the offense within 60 days after the commission of same. The recorder's court took official cognizance of the offense against the defendants within the 60 days and under the statute had exclusive, original jurisdiction. On the appeal by defendants to the Superior Court, the trial was *de novo* on the charge set forth in the warrant for which defendants were tried in the recorder's court. The Superior Court only acquired jurisdiction by appeal. We construe the law and not make it. The case must be remanded to the Superior Court to be tried *de novo* on the warrant issued against the defendants, for which they were convicted and appealed to the Superior Court. The bill of indictment included Mrs. T. E. Goff, Sr. She was not charged with the offense in the recorder's court and the bill of indictment was found at July Term, 1933, of the Superior Court beginning 24 July, 1933, the offense was alleged to have been committed on 24 June, 1933. The 60 days had not expired to try her in the Superior Court. The record shows that she did not appeal to this Court from the judgment against her in the Superior Court. It is stated in the record that the defendants who appealed to this Court, in the Superior Court were *inops consilii.* Art. I, sec. 11, Const., N. C.; C. S., 4515 "Accused entitled to counsel." This case indicates that the old adage is true: "A man who is his own lawyer has a fool for a client." If defendants had had counsel, the statutes would, no doubt, have been called to the attention of the learned solicitor and capable judge in the court below.

For the reasons given, the action against the appealing defendants is remanded to the Superior Court to be tried *de novo* on the warrant.

Remanded.

GRACE ARMSTRONG v. ACME SPINNING COMPANY.

(Filed 10 January, 1934.)

1. **Master and Servant C e—Evidence held to show that act of fellow-servant was sole proximate cause of injury, and nonsuit was proper.**

   In this action by an employee against her employer to recover for personal injury alleged to have resulted from the employer's negligence, the evidence tended to show that the plaintiff went from the inside of the building where she was employed to work to the outside of the building for rest and fresh air, and sat on a window ledge, that the transom of the window had been raised for ventilation and left in a position where it could not fall or cause injury, but that another employee, a fellow-servant of plaintiff, in order to more conveniently talk with plaintiff from the inside of the building, moved the transom and that afterwards the transom fell upon plaintiff, causing the injury in suit. *Held*, there was no evidence of any negligence on the part of defendant employer, the evidence tending to show that the injury resulted solely from the act of plaintiff's fellow-servant, and a judgment as of nonsuit should have been entered on defendant's motion, and *held further*, the doctrine of *res ipsa loquitur* does not apply.

2. **Negligence A e—**

   The doctrine of *res ipsa loquitur* does not apply where it is shown by direct evidence that the injury in suit was caused not by defendant's negligence, but by the act of plaintiff's fellow-servant.

APPEAL by defendant from *Hill, Special Judge,* at May Special Term, 1933, of MECKLENBURG. Reversed.

This is an action to recover damages for personal injuries suffered by the plaintiff, while she was at work on 1 June, 1927, as an employee of the defendant in its cotton mill, at Belmont, N. C.

It is alleged in the complaint, that on or about 1 June, 1927, while the plaintiff, who was then about 16 years of age, was sitting, temporarily for the purpose of resting from her work, in a window in defendant's cotton mill, where she was employed by the defendant as a spinner, the lower transom of the window, which had been raised for purposes of ventilation, fell and struck her on the head, thereby causing injuries, by reason of which she has sustained damages in a large sum, to wit: $20,000.

It is further alleged in the complaint that the transom, which had been raised by one of the employees of the defendant, who had charge of the room in which plaintiff was at work, for purposes of ventilation, fell because it had not been properly fastened by means of the chain which had been provided by the defendant for that purpose, and that defendant's negligence in failing to exercise due care to have the transom, when raised, properly fastened by means of the chain or otherwise, was the proximate cause of the injuries suffered by the plaintiff, and of the damages which she sustained as the result of such injuries.

These allegations are denied in defendant's answer.

The defendant further alleges in its answer that the transom fell because after it had been raised by one of its employees for purposes of ventilation, and after it had been left in such a position as that it would not fall, it was moved from such position by a fellow-servant of the plaintiff, for his own purposes, and that the act of such fellow-servant, was the sole proximate cause of such injuries as the plaintiff suffered, when the transom fell and struck her on the head. The defendant further alleges in its answer, that if the plaintiff was injured by its negligence as alleged in the complaint, she contributed to her injuries by her own negligence.

At the trial of the action, evidence was offered by both the plaintiff and the defendant.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff, Grace Armstrong, injured by the negligence of the defendant, Acme Spinning Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by her own negligence, contribute to her injuries, as alleged in the answer? Answer: No.

3. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $3,200."

From judgment that plaintiff recover of the defendant the sum of $3,200, and the costs of the action, the defendant appealed to the Supreme Court.

G. T. Carswell and Joe W. Ervin for plaintiff.
Tillett, Tillett & Kennedy for defendant.

CONNOR, J. The evidence offered by the plaintiff at the trial of this action shows that when the plaintiff left the spinning frames in the defendant's cotton mill, where she had been at work, and went out of the mill, and sat down in the window to rest, on the outside of the mill, the transom in said window, which had been raised, and which later fell and struck her on the head, was in such position as that it would not ordinarily fall. The bottom of the transom had been pushed outward and upward; the top, inward and downward. It had been left in this position by the employee of defendant who had raised it for purposes of ventilation. When left in this position, it was not necessary to fasten the transom with the chain, which was attached to its top. All the evidence shows that when left in this position, there was no probability that the transom would fall. When the plaintiff sat down in the window, on the outside of the mill, the bottom of the transom was over her head, and the top was down on the inside of the mill. The transom did not fall until after the plaintiff had sat in the window for some time engaged in conversation with a companion.

While the plaintiff and her companion were sitting in the window, Herman Bush, an employee of the defendant, and a fellow-servant of the plaintiff, left his work in the mill, and went to the window in which the plaintiff was sitting. He talked to the plaintiff and her companion, through the window, for about five minutes. He was on the inside, and the plaintiff and her companion on the outside of the mill. The transom was between them. Immediately after Herman Bush left the window and returned to his work in the mill, the transom fell and struck the plaintiff on the head. The plaintiff testified that she did not see Herman Bush while he was talking to her and her companion, through the window, but that he had been talking to them just before the transom fell. She did not know what caused the transom to fall.

The evidence offered by the defendant shows that when Herman Bush left his work in the mill and went to the window in which the plaintiff and her companion were sitting, he found that the position in which the transom had been left interfered with his conversation with them, and that for that reason he moved the transom, and that his act in moving the transom from the position in which it had been left by defendant's employee, who had raised it for purposes of ventilation, was the cause of plaintiff's injuries. Viola Duncan who was sitting in the window with the plaintiff, at the time she was injured, testified that Herman Bush took hold of the transom, and moved it, so that he could talk through the window to her and the plaintiff, and that the transom fell when he left the window to return to his work. Herman Bush testified that when he walked to the window, he found that he could not talk to the plaintiff and her companion, because of the position of the transom, and that for this reason he moved the transom so that it was level, instead of slanting. When he turned the transom loose, it dropped and hit the plaintiff on the head.

At the close of all the evidence, the defendant renewed its motion for judgment as of nonsuit, first made at the close of the plaintiff's evidence. This motion was denied, and defendant excepted. The assignment of error based on this exception must be sustained. There was no evidence tending to show that the plaintiff was injured by the negligence of the defendant as alleged in the complaint. The principle of *res ipsa loquitur* is not applicable in this case, and does not aid the plaintiff, whose evidence was not sufficient to establish facts from which inferences could be drawn by the jury in support of the allegations of the complaint. All the evidence shows that the plaintiff was injured by the act of a fellow-servant, and not by the negligence of the defendant. For this reason, the action should be dismissed. See *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251; *Saunders v. R. R.,* 185 N. C., 289, 117 S. E., 4. The judgment must be

Reversed.

CLARKSON, J., dissenting: In my opinion it cannot be said as a matter of law that there was no sufficient competent evidence, tending to show that the plaintiff in this action was injured by the negligence of the defendant as alleged in the complaint. On a motion as of nonsuit, the evidence is to be considered in the light most favorable to the plaintiff. C. S., 567; *Lynch v. Tel. Co.,* 204 N. C., 252; *Thigpen v. Ins. Co.,* 204 N. C., 551. Viewing the evidence in that light, I think it was a matter for the jury.

There is conflicting testimony as to whether or not Herman Bush, one of the defendant's witnesses, who was at the time of the injury an employee of the defendant and a fellow-servant of the plaintiff, moved the transom of the window, and that his act in moving the transom from the position it had been left by the defendant's employee, who had raised it to provide ventilation, was the cause of the plaintiff's injury. Only upon the theory that his action as a fellow-servant in moving the transom was the cause of the injury could the defendant be barred from a recovery, for there was no evidence of contributory negligence.

The thing causing the injury of the plaintiff was under the defendant's management or of its servants, at the time of the injury, and this fact distinguishes it from *Saunders v. R. R.,* 185 N. C., 289, in which the evidence tended only to show that a window which another passenger on a railroad train had raised and left open fell upon the plaintiff's arm, then resting on the sill. This Court in that case, p. 292, said that "If it had been shown that the defendant's servants opened the window, the sash of which subsequently fell, the question would have been presented whether from its subsequent fall negligence could have been found." The situation, which was distinctly pointed out there does not exist in this action.

For the reason that, as above shown, this action stands on a different footing from that of *Saunders v. R. R., supra,* the principle of *res ipsa loquitur* is applicable in this case. Quoting from *Scott v. The London Docks Co.,* 159 Eng. Rep., 665, in *Saunders v. R. R., supra,* the rule was stated as follows: "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In his monumental work on Evidence, Vol. 5 (2d ed.), sec. 2509, p. 498, Wigmore cites with approval a decision of the North Carolina Supreme Court by *Associate Justice H. G. Connor,* in *Ross v. Cotton Mills,* 140 N. C., 115: "The underlying reason for the rule is that usually the chief evidence of the true cause of procedure is practically accessible to the defendant, but inaccessible to the person injured. It is for this reason that in some cases the Legislature has made the fact of injury 'presumptive evidence' and in others a prima facie case. . . . To prevent any misconstruction of the circumstances under which or the manner in which this principle applies in the trial of causes, we wish to restate: . . . It does not in any degree affect or modify the elementary principle that the burden of the issue is on the plaintiff. *Walker, J.,* in *Stewart v. Carpet Co.,* 138 N. C., 60, clearly states the rule, as follows: 'The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant "to go forward with his proof." The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor.' The suggestion has been made in argument of cases at this term that, when the rule applies, it is the duty of the court to instruct the jury that proof which calls the rule into action constitutes a prima facie case or raises a presumption of negligence. This is a misapprehension both of the principle upon which the rule is founded and its application. . . . the law says that the plaintiff is entitled to have a jury pass upon the physical facts and condition, and to say whether in their opinion he has made good his allegation of actionable negligence. The defendant may, or may not, introduce evidence as it is advised. By failing to do so, it admits nothing, but simply takes the risk on nonpersuasion. This is what is meant by 'going forward' with testimony. He, by this course, says that he is willing to go to the jury upon the plaintiff's evidence."

Prof. Wigmore points out that this rule of evidence, which merely entitles the plaintiff to have a jury pass upon the physical facts and condition, suggests that the following considerations ought to limit the rule: "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured." Wigmore on Evidence (2d ed.), Vol. 5, sec. 2509, p. 498. To which Wigmore adds that "the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." Wigmore on Evidence, *supra.*

Applying these limitations to the instant case, the window is an apparatus of a character that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection or user. Both inspection and user was at the time of the injury in the control of the defendant, for it had the right of such control. The rule that the exclusive control and management of the appliance or thing causing the injury must be shown to have been in defendant does not mean actual physical control, but refers to the right of such control. 45 C. J., sec. 781, p. 1216. The evidence shows that the injurious occurrence or condition happened irrespective of any voluntary action at the time by the party injured.

It has been held that the principle of *res ipsa loquitur* does not apply: (1) When all the facts causing the accident or injury are known and testified to by witnesses at the trial; (2) where more than one inference can be drawn from the evidence as to the cause of the injury, (3) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture: (4) where it appears that the accident was due to a cause beyond the defendant, such as an act of God, or the wrongful or tortious act of a stranger; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant; (6) where the injury results from accident as defined and contemplated by law. *Springs v. Doll,* 197 N. C., 240.

There was conflicting testimony as to whether or not Herman Bush moved the transom. The plaintiff testifying merely that he came to the window and her father testifying that Herman Bush had told him before the trial that he did not, while Viola Duncan corroborated Bush in his testimony that he did move the transom. Only one inference can be drawn as to the cause of the accident or injury, which was the falling of the window. In the light of all the surrounding circumstances, the existence of negligent default was the more reasonable probability, and the cause of the accident or injury was not left in conjecture. It has already been pointed out that the accident was not caused by the intervening act of a stranger and that the window was under the exclusive control of the defendant.

The evidence was to the effect that the accident or injury was caused by the falling of the window. The window was under the exclusive control of the defendant or its servants, that under ordinary conditions no injurious falling of the window was to be expected. The falling of the window happened irrespective of any voluntary action by the plaintiff that the cause of the injury was the falling of the window but there was a conflict of testimony as to the cause of the falling of the window. Only one inference can be drawn from the evidence that the cause of the accident or injury was the falling of the window, that the existence of negligent default was the more reasonable probability, and the direct and proximate cause of the injury was not left in conjecture. The injury did not result from an accident as defined and contemplated by law.

If the principle of *res ipsa loquitur* be rejected, then it must be conceded that there was a conflict of testimony as to the cause of the negligent falling of the window, whether it was due to any negligent failure of the defendant to use ordinary care to provide a reasonably safe place for its employees, *West v. Mining Corp.,* 198 N. C., 150, or the negligent act of a fellow-servant, *Richardson v. Cotton Mills,* 189 N. C., 653; *Cook v. Mfg. Co.,* 183 N. C., 48. It is the accepted rule that where more than one inference can be drawn from the facts alleged to constitute negligence, the question as to whether there was negligence is for the jury. *Russell v. R. R.,* 118 N. C., 1098; *Buchanan v. Lumber Co.,* 168 N. C., 40. This contention is not at variance with the previous statement that only one inference can be drawn as to the cause of the injury, for it is not controverted that the cause was the falling of the window, but if the principle of *res ipsa loquitur* is rejected, then there does remain the question as to the cause of the falling of the window, the contention of the defendant being that it was due to the negligent act of a fellow-servant while the plaintiff contends that it was due to the negligent failure to use ordinary care to provide a reasonably safe place in which to work.

In any view of the facts of this case, it was a matter for the jury to pass upon, that was the course pursued by the court below. The jury found the conflicting evidence in favor of plaintiff and I think the verdict and judgment should be upheld.

W. O. EVANS, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF MECKLENBURG COUNTY, v. MECKLENBURG COUNTY AND H. B. FOWLER, W. B. BLYTHE, H. W. HARKEY, W. H. HALL, AND B. J. HUNTER, MEMBERS OF THE BOARD OF COMMISSIONERS.

(Filed 10 January, 1934.)

1. Schools and School Districts A d—Former special districts held abolished except for levying taxes as provided by ch. 562, Laws of 1933.

An act creating a special charter school district and providing among other things that an issue of bonds for school sites, buildings, etc., should first be submitted to a vote of the electors of the district, is repealed by a later general act, chapter 562, Public Laws of 1933, enacted to provide a uniform State system of public schools in the interest of economy and better management, which provides a different method for the issuance of bonds for such purposes and expressly repeals all conflicting laws, and provides that such special charter and tax districts should levy taxes for school-operating purposes only as provided in the general act, and where such district has been constituted an administrative unit by the State School Commission, it may not be successfully maintained that a bond issue for school sites, buildings, etc., in such district must first be submitted to the voters of the district in accordance with the provisions of the former law.

2. Counties E b—Maintenance of school term is county expense and it may issue bonds necessary therefor in one of its districts.

A county is an administrative unit of the State in our State-wide public school system, and under mandate of Art. IX, sec. 3, a statute requiring a county to maintain at least a six months school term in each of its school districts and to provide the necessary funds therefor by taxation or otherwise, is valid, and is specifically provided for in sec. 8 of the County Finance Act, and under the statutes a county is authorized to issue bonds necessary to the maintenance of the constitutional school term in one of its districts without the necessity of submitting the issuance of the bonds to a vote, and expenses necessary to the maintenance of the school term in a district include school sites, buildings, a necessary auditorium and shop for a technical high school, and sewage disposal plants, together with toilet facilities, necessary to the health of attending scholars in a rural school.

APPEAL by plaintiff from *Hill, Special Judge,* at Special December Term, 1933, of MECKLENBURG. Affirmed.

The plaintiff brought suit to enjoin the defendants from issuing bonds of Mecklenburg County in the sum of $438,200, of which it is proposed to use $400,000 in erecting school buildings and additions to school buildings in the city of Charlotte on sites owned by the city or to be purchased, and $38,200 in making additions to and improvements in certain rural school buildings. Pleadings were filed, trial by jury was waived, and the court found the following facts:

1. . . .
2. . . .

3. The trustees of the Charlotte City Administrative Unit adopted a resolution on 22 November, 1933, requesting the board of county commissioners for Mecklenburg County to issue bonds in the sum of $400,000 for the erection of school buildings, additions to school buildings and the purchase of school sites within the limits of the city of Charlotte, and said resolution provides that said board found as a fact that the issuance of said bonds was necessary to carry on the constitutional six months school term in the city of Charlotte.

4. The county board of education for Mecklenburg County adopted a resolution on 22 November, 1933, requesting the board of commissioners for Mecklenburg County to issue bonds in the sum of $438,200 for the erection of school buildings, additions to school buildings and purchase of school sites in the county of Mecklenburg, and said resolution provides that the board found as a fact that the issuance of said bonds was necessary to carry on the constitutional six months school term in Mecklenburg County.

5. On 22 November, 1933, a resolution or bond order was introduced by one of the members of the board of commissioners for Mecklenburg County and said resolution or bond order was finally passed by said board on 4 December, 1933; and said resolution or bond order provided that the board of commissioners for Mecklenburg County found as a fact that the issuance of said bonds in the sum of $438,200 was necessary to carry on the constitutional six months school term in Mecklenburg County.

6. All of the provisions of chapter 21, Public Laws, 1927, known as the County Finance Act, and acts amendatory thereof and supplemental thereof, which provides for the issuance of bonds by counties for the erection of school buildings, additions to school buildings and purchase of school sites, have been complied with by the board of commissioners for Mecklenburg County.

7. The issuance of said bonds and the expenditure of the funds derived from the sale of said bonds is a necessary expense; it is necessary to issue said bonds and to use the funds to be derived from the sale thereof in order for the public schools of Mecklenburg County to be maintained as is required by the Constitution of the State of North Carolina.

8. In the issuance of said bonds the above named defendants are acting as an administrative agency of the State of North Carolina and are empowered by the General Assembly to discharge the duties imposed upon them by the Constitution to provide a state system of public schools according to the provisions of said Constitution.

9. Chapter 342, Private Laws, 1907, and acts amendatory thereof, created a special charter district coterminous with the corporate limits of the city of Charlotte, with full power therein granted to purchase sites and to provide necessary school buildings to meet the needs of the scholastic population of the city of Charlotte.

10. Since the adoption of chapter 562, Public Laws, 1933, by the General Assembly, the State School Commission had directed that the city of Charlotte be set up as a city administrative unit for the purpose of operating its schools, as provided by chapter 562, Public Laws, 1933.

11. The total bonded indebtedness for schools in Mecklenburg County, including the bonds authorized by the order of the board of commissioners, under date of 4 December, 1933, does not exceed five per cent of the assessed valuation of taxable property in Mecklenburg County, as shown by a financial statement made a part of this record.

Upon the foregoing facts the trial court adjudged that the defendants have right in law to issue and sell the proposed bonds and to levy a tax for their payment and denied the plaintiff's prayer for injunctive relief. The plaintiff excepted to the judgment and appealed.

J. L. DeLaney for plaintiff.
Stancill & Davis and Bridges & Orr for defendants.

ADAMS, J. By an act of the General Assembly the city of Charlotte was made a special charter district and the board of school commissioners was given exclusive control of the public school system of the city, including authority to purchase sites and to provide such buildings and equipment as were essential to the efficient operation of its public schools. Private Laws, 1907, chap. 342, sec. 197, *et seq.* Subsequent legislation provided machinery by which in special charter districts elections might be held, bonds might be issued, and taxes might be levied for payment of the bonds, principal and interest. Public Laws, 1923, chap. 136, sec. 263; Public Laws, 1924, Extra Session, chap. 121; Public Laws, 1927, chap. 109. The plaintiff claims that the statute creating the special charter district, whose boundaries were coterminous with those of the city, has never been repealed as provided by the Public Laws of 1923, chap. 136, sec. 157; that bonds can be issued only when approved by an election held as prescribed; and that the county is without authority to issue bonds or to levy a county tax for the erection of school buildings on sites owned within the corporate boundaries. This in effect is the postulate upon which the plaintiff rests his argument that the defendants should be enjoined from issuing and selling the proposed bonds and from levying the tax requested by the city school commissioners and the county board of education.

In reply the defendants say that the General Assembly at the session of 1933 changed and transformed the public school system to such extent that the statutes invoked by the plaintiff are not decisive of the pending questions. Public Laws, 1933, chap. 562. The asserted purpose of the latter act is to promote efficiency in the organization and economy in the administration of the public schools, and to provide for the operation of a uniform system of schools for the entire State. This signifies, as indeed the act declares, that the State has adopted a policy of supporting its public schools and has consequently in part modified and in part abolished the former system.

All the powers and duties conferred by the recent act and those previously conferred by law upon the State Board of Equalization are now vested in the State School Commission. Public Laws, 1927, chap. 256; Public Laws, 1929, chap. 245; Public Laws, 1931, chap. 430; Public Laws, 1933, chap. 562, sec. 2. This commission may in the exercise of its sound judgment suspend the operation of schools in any county or district for a part or all of the last forty days of the consolidated term. It shall classify each county as an administrative unit and with the advice of the county board of education shall redistrict each county. Any newly constituted district having the requisite school population in which there is a special charter school may with the approval of the commission be classified as a city administrative unit to be dealt with by the State school authorities in like manner with county administrative units; and if an existing special charter district is included in a district as determined by the commission, the trustees of the special charter district shall be retained as the governing body.

These and other provisions of the act of 1933 (to which we need not particularly advert) including the clause which repeals all conflicting public, public-local, and private laws, indicate a legislative intent to annul or to subordinate to the new law all statutes relating to the public schools which were in effect at the time of its enactment and to establish a uniform system under which all the public schools of the State shall be conducted. To the accomplishment of this purpose it was found necessary to abrogate certain school districts as appears in the following clauses of the fourth section: "All school districts, special tax, special charter or otherwise, as now constituted for school administrative or for tax levying purposes are hereby declared nonexistent and it shall be unlawful for any taxes to be levied in said districts for school operating purposes except as provided in this act: *Provided,* that nothing herein contained shall be construed to prevent the tax-levying authorities in any administrative unit, with the approval of the State School Commission, from levying taxes to provide the necessary funds for teaching vocational agriculture and home economics in such unit when said tax-levying authorities are now authorized by law to do so and are now levying taxes for such purposes."

What are the other taxes "provided in this act?" In section 4 it is enacted that in redistricting a county, if a territorial district or unit in which a bond tax has been voted is divided or consolidated or otherwise integrated with a new district and thereby abolished as a school district, such unit shall be maintained until all taxes necessary for the payment of its bonds shall have been levied and collected; but the indebtedness of a special charter district or special tax district may be taken over by the county. Section 17 provides for an election to determine whether, at the instance of the county board of education in any county administrative unit or the board of trustees in any city administrative unit, with the approval of the tax-levying authorities in the county or in the city administrative unit and of the State School Commission, a tax shall be levied for the operation of schools of a higher standard than those for which provision is made by State support. Reference is made also to taxes levied under the former law and remaining unpaid. It will be observed, then, that none of these clauses aids the plaintiff and that the force of his argument must be determined by the construction of the first paragraph of section four.

This paragraph annuls all school districts which under the former law were constituted either for the general purpose of school administration or for the specified purpose of levying taxes—the single exception being the power to levy taxes for school operating purposes "as provided in this act." With this exception the preceding alternative terms are all-including. By virtue of the act of 1933 the State School Commission has constituted the city of Charlotte a city administrative unit, and the special charter district being nonexistent is without authority to perform the functions upon which the plaintiff insists.

The county of Mecklenburg is an administrative unit in the public school system. The Constitution directs that each county of the State shall be divided into a convenient number of districts in which one or more public schools shall be maintained at least six months in every year. Art. IX, sec. 3. By reason of this mandate it is within the power of the General Assembly to authorize and direct the counties of the State as administrative units or governmental agencies to provide the necessary funds by taxation or otherwise. *Tate v. Board of Education,* 192 N. C., 516; *Frazier v. Comrs.,* 194 N. C., 49. Specific authorization for this purpose is found in section 8 of the County Finance Act: "The special approval of the General Assembly is hereby given to the issuance by counties of bonds and notes for the special purposes named in this section, and to the levy of property taxes for the payment of such bonds and notes and interests thereon." Among the enumerated purposes are the erection and the purchase of school houses, which by the express terms of the statute, include purchase of the necessary land and in the case of buildings provision for necessary equipment and facilities. Public Laws, 1927, chap. 81, sec. 8.

The resolutions of the county board of education and of the board of county commissioners include in the proposed improvements an auditorium for West Charlotte High School, a new shop for the Technical High School, and for Hoskins Rural School and Oakdale Rural School sewage disposal plants, together with toilet facilities for the latter institution. As to these we are of opinion that the auditorium and the shop are component parts of a general system and in a modern school are often no less serviceable than rooms for classes, and that provision for sanitation is a measure suitable and frequently indispensable to the promotion and preservation of the health of the pupils and to the general efficiency of the school. The order of the board of county commissioners is within the contemplation of the recent act. Cognate questions arising under the former law are discussed in *Reeves v. Board of Education,* 204 N. C., 74, which accords in theory with the conclusion herein announced. The judgment of the Superior Court is

Affirmed.

ETHEL M. CAIN MOFFITT, GENERAL GUARDIAN OF HETTIE M. CAIN; MINNIE F. CAIN AND GRACE CAIN BRITT, MINORS; AND SELMA CAIN REGAN, RUTH CAIN CALLINGER, H. T. CAIN, L. J. CAIN AND E. W. CAIN, v. IRENE DAVIS, COUNTY OF BLADEN, AND H. C. BRIDGER, JR., E. N. DAVIS AND D. M. SHAW.

(Filed 10 January, 1934.)

1. **Wills F i—Devisee may be held liable only to extent of property devised.**

In an action against a devisee under the will of a former clerk of the Superior Court and others to recover for the clerk's shortage in accounting for the funds of an estate, judgment may be rendered against the devisee only to the extent of the property passing under the clerk's will, and personal judgment against the devisee is error. C. S., 60.

2. **Public Officers C d—County commissioners may be held liable for failure to perform ministerial duty of requiring bond of clerk.**

There is no penalty or crime prescribed by C. S., 1297(12), for failure of county commissioners to perform the ministerial duty therein imposed upon them of qualifying and inducting into office certain county officers and approving the bonds of such officers, but C. S., 335, makes them liable as sureties on bonds which they approve with knowledge, actual or implied, that they are insufficient in penal sum or security, and construing the statutes together it *is held* that the county commissioners may be held individually liable by a person sustaining loss by reason of their failure to perform their ministerial duty of requiring bond of a clerk of the Superior Court.

3. Appeal and Error J c—

Findings of fact by a referee, supported by evidence and approved by the trial court, are conclusive on appeal.

APPEAL by defendants from *Sinclair, J.,* at August Term, 1933, of BLADEN. Modified and affirmed.

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, N. A. Sinclair, judge presiding at the August Term, 1933, of Superior Court of Bladen County, and it appearing to the court that at the April Term, 1933, of the Superior Court of Bladen County, on motion of H. H. Clark, attorney for the defendants, for a reference of this action, that the same was referred to R. J. Hester, attorney, who filed his said report in this court; and it further appearing to the court that no exceptions were filed to said report either by the defendants or plaintiffs; and a jury trial having been waived and the questions of facts involved submitted to the court for adjudication, together with the referee's report, and motion being made by attorneys for plaintiffs for adoption of said referee's report as the judgment of this court, said report adjuding that the plaintiffs were entitled to recover of the defendants the sum of $1,000.50 and interest thereon from 23 July, 1928, until paid. It is therefore, on motion of P. R. Hines and H. L. Williamson, attorneys for plaintiffs, ordered, adjudged and decreed by the court that the report filed by said referee to this action be and the same is hereby adopted as the judgment of this court, and that the plaintiffs recover of the defendants, Irene Davis, H. C. Bridger, Jr., E. N. Davis and D. M. Shaw, or either of them, the sum of $1,000.50 with interest thereon from 23 July, 1928, until paid, and that the costs of this action, including allowance to referee, be taxed against the defendants. It appearing to the court that plaintiffs, through their counsel, made a motion as of nonsuit as to the defendant, county of Bladen, it is further ordered and adjudged that a judgment of nonsuit be entered in this action as to the county of Bladen. It is further adjudged that the referee be allowed the sum of $100.00 in full for his services. It is further adjudged that the attorneys for the plaintiffs be allowed for their services in this action the sum of $350.00 jointly."

The exceptions and assignments of error and necessary facts will be considered in the opinion.

P. R. Hines and H. L. Williamson for plaintiffs.
H. H. Clark for defendant.

CLARKSON, J. The only exception and assignment of error is to the judgment as signed by the court below. The defendant, Irene Davis contends that the personal judgment against her should be modified. In this we think she is correct. The record discloses that Irene Davis was the devisee under the last will and testament of W. J. Davis, clerk of the Superior Court of Bladen County, N. C.

The plaintiffs in their complaint say: "The judgment against Irene Davis, the devisee under the last will and testament of W. J. Davis, should be declared by the court to be a specific and prior lien against said property according to law," etc. And in their prayer for judgment: "That in event the funds derived from a sale of the property included in said deed of trust fails to pay and satisfy any judgment rendered herein against her, then the said judgment to be declared by the court to be a specific and prior lien against any other property that may have been owned by W. J. Davis, at the time of his death." We think the judgment should be modified in accordance with the complaint and the prayer of plaintiffs.

In *Andres v. Powell,* 97 N. C., 155 (160), we find: "Section 1528 (C. S., 59), enacts, that 'all persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest, or distribution, shall be liable jointly and not separately, for the debts of such decedent.' And section 1529 (C. S., 60), provides, that 'no person shall be liable under the preceding section, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator, or collector of the decedent, and it is incumbent on the creditor to show the matters herein required, to render such person liable.' All these acts are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estates of dead men."

The defendants further contend: "Accepting the findings of the referee to be true, as we must do, and as the court has done and adopted as a part of the judgment, are defendants, Bridger, Shaw and Davis liable?" We think so.

It is alleged in the complaint: "That as the plaintiffs are advised, informed and believe, the defendants H. C. Bridger, Jr., E. N. Davis, and C. M. Shaw, while acting as county commissioners of said county during the years of 1926, 1927, and 1928, failed and neglected to perform the duties of their office as required by law, in that—(a) They failed and neglected to lawfully induct into office on the first Monday in December, 1926, the clerk of the Superior Court of Bladen County, in that they did not require or receive a bond from said clerk as required by law." The referee finds: "It is admitted that W. J. Davis had no bond from the time he was inducted into office in 1926."

It was the duty of the county commissioners: C. S., 1297 (12)—"To approve bonds of county officers and induct into office. To qualify and induct into office at the meeting of the board, on the first Monday in the month next succeeding their election or appointment, the following named county officers, to wit: clerk of the Superior Court, sheriff, coroner, treasurer, register of deeds, surveyor, and constable; and to take and approve the official bonds of such officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the Superior Court, except the bond of the said clerk, which shall be deposited with the register of deeds, for safe keeping," etc.

In *Hipp v. Farrell,* 169 N. C., 551, the liability of a public officer is thus stated, at p. 554-5: "It is recognized in this State, supported, we think, by the weight of well considered authority in other jurisdictions, that one who holds a public office, administrative in character, and in reference to an act clearly ministerial, may be held individually liable, in a civil action, to one who has received special injuries in consequence of his failure to perform or negligence in the performance of his official duty. . . . Upon the question thus presented it must at once be conceded that there is a conflict in authority, but the very decided trend of modern decision is to hold such officers liable for acts of nonfeasance, or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when its performance or nonperformance, or the manner of its performance involves no question of discretion. In short, where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby, Shearman and Redfield on Negligence (3d ed.), sec. 156, thus state the rule: 'The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply ministerial—he is liable in damages to any one especially injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary or proper, he is not liable to any private person for neglect to exercise those powers, nor for the consequence of a lawful exercise of them where no corruption or malice can be imputed, and he keeps within the scope of his authority.'" See *Hudson v. McArthur,* 152 N. C., 445, and dissenting opinion by *Brown, J.,* concurred in by *Walker, J.*

In *Fore v. Feimster,* 171 N. C., 551 (554), we find: "In some cases the members of the board are made indictable; in others penalties are imposed. In certain specified instances, and particularly in cases of taking official bonds of sheriffs and tax collectors, the commissioners are expressly made individually liable as sureties where they knowingly take such a bond that is inadequate or inefficient, Revisal, secs. 313 (C. S., 335), and 2914; and under penalty of forfeiting his office, their clerk is required to keep a record of the vote on official bonds so that evidence may be available as to how each member of the board has voted on these questions." *Hipp v. Farrell,* 173 N. C., 167; *Brown v. R. R.,* 188 N. C., 52; *Noland v. Trustees,* 190 N. C., 250.

In the *Fore case, supra,* the violation of the particular act is made a misdemeanor. In the *Noland case, supra* (p. 254-5), is the following: "True, in a number of cases, notably *Hipp v. Farrell,* 169 N. C., 551, *S. c.,* 173 N. C., 167, it was said, in substance, that one who holds a public office, administrative in character, and in reference to an act clearly ministerial, may be held individually liable in a civil action, to the extent of any special damages sustained by reason of his failure to perform his official duties; and in *Holt v. McLean,* 75 N. C., 347, there is a dictum to the effect that, under such conditions, he may also be liable criminally to the public. But these decisions were made in reference to other statutes, and they are not controlling here. The fact that the General Assembly has imposed personal liability in some cases and failed to do so in others is equivalent to a legislative declaration that, in the latter instances, individual liability is not to attach. *Expressio unius est exclusio alterius. Fore v. Feimster,* 171 N. C., p. 555, and cases there cited."

C. S., 335, is as follows: "Every commissioner who approves an official bond, which he knows to be, or which by reasonable diligence he could have discovered to have been, insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond."

C. S., 1297(12), above set forth is mandatory on the county commissioners. An imperative, unmistakable duty is imposed and there is no penalty or crime attached for the nonperformance of this clear ministerial duty in the act under consideration. C. S., 325, provides a penalty for officers acting without bond. C. S., 326, provides for condition and terms of official bonds. C. S., 1302, fixes a penalty on any county commissioner and also makes it a misdemeanor for neglect of duty. C. S., 4384, provides that wilful omissions, neglect or refusal to discharge any duties of his office—guilty of a misdemeanor and removal from office if wilful and corrupt.

C. S., 335, *supra,* which makes the commissioners liable as surety for taking an insufficient bond, construed *in pari materia* with C. S., 1297 (12), necessarily takes the present case out of the decisions in the *Fore* and *Noland cases.* Public officials entrusted in so important a matter as this mandatory statute, we find from the weight of authority, are held individually liable to any one injured by their wilful failure or neglect of duty. To hold otherwise would put a premium on inefficiency and neglect.

Troop, Public Officers, section 726, in part, at p. 690, thus states the principle: "But an officer owes to every individual, the duty of performing his official acts with due care; and he is consequently liable to any individual, who is injured in person or in property by reason of his negligence in performing a ministerial act. Many instances, where actions for such negligence have been sustained, against not only the officer himself, but against the sureties in his official bond, have been given in former chapters of this work."

The defendants made no exception or assignment of error on the report of the referee. The referee found: "That at the time of the death of Mr. W. J. Davis (20 April, 1928), he was due the estate of L. T. Cain the sum of $2,133.33 and not $1,132.83 (the amount turned over to Newton Robinson by his widow). The estate then is entitled to the difference between $2,133.33 and $1,132.83, which is the sum of $1,000.50, and it is found that the estate is due the interest upon the sum of $1,000.50 from 23 July, 1928, until paid."

It is too late now for defendants to complain. In *Mfg. Co. v. Lumber Co.,* 177 N. C., 404 (407), citing numerous authorities, it is said: "As to the referee's findings of fact, there was evidence to support them, and they were fully considered and approved by the judge. When this is the case, we do not review them here." *Abbitt v. Gregory,* 201 N. C., 577 (596); *Thigpen v. Trust Co.,* 203 N. C., 291. For the reasons given, the judgment of the court below is

Modified and affirmed.

G. W. DRY v. G. D. B. REYNOLDS AND J. C. PARKER.

(Filed 10 January, 1934.)

1. **Bills and Notes C a—**

   A surety on a negotiable note is absolutely required to pay same and is a party primarily liable under the terms of the negotiable instruments law. C. S., 2977.

2. **Bills and Notes F a—Failure to present note does not discharge maker or sureties thereon.**

   Where a note is made payable at a certain bank, the failure of the payee to present it for payment at the bank on the date due does not release the maker or surety on the note, both maker and surety being parties primarily liable on the note. C. S., 3051.

3. **Bills and Notes G c—Deposit by maker sufficient to pay note in bank at which note is payable does not discharge maker or surety.**

   The fact that the maker of a negotiable note payable at a certain bank kept a deposit sufficient to pay the note at the bank on the due date may amount to a tender of payment under C. S., 3051, but such tender would discharge only persons secondarily liable on the note, and would not discharge the liability of the maker and surety on the note, C. S., 3102, and the bank is regarded as the agent of the maker for the payment of the note upon presentment, and not the agent of the payee, and the liability of the maker and surety is not discharged by the payee's failure to present the note for payment at the bank on the due date.

4. **Bills and Notes G a—**

   Where a note is made payable at a certain bank it amounts to an order to the bank to pay same out of the maker's deposit upon presentment when due. C. S., 3069.

APPEAL by defendant Parker, from *Harding, J.,* at May Term, 1933, of STANLY. Affirmed.

The plaintiff declared on the following promissory note:

"$500.00 Albemarle, N. C., 12 May, 1923.

On or before the 12th day of May, 1924, I, we, or either of us, promise to pay to the order of G. W. Dry, the sum of five hundred and 00/100 dollars, negotiable and payable at the Stanly Bank and Trust Company, Albemarle, N. C., with interest at the rate of six per cent per annum from date, payable annually until paid, and the securities and endorsers hereby waive protest, notice of protest and notice of nonpayment hereof, and guarantee the payment of this note at maturity or any time thereafter, and consent that the time of payment be extended without notice hereof.

G. D. B. Reynolds. (Seal.)
J. C. Parker, Surety. (Seal.)

Witness: J. R. Price."

Seven issues were submitted, the first three of which were answered by consent, the fourth, fifth, and sixth upon the evidence, and the seventh by the court without objection after the others had been answered by the jury:

1. Did the defendant, G. D. B. Reynolds, execute the note as alleged? Answer: Yes (by consent).

2. Did the defendant, J. C. Parker, sign said note as surety, as alleged? Answer: Yes (by consent).

3. Did the plaintiff fail to present the note for payment to the Stanly Bank and Trust Company at maturity, as alleged in the answer? Answer: Yes (by consent).

4. Did the defendant, G. D. B. Reynolds, have on deposit in the Stanly Bank and Trust Company funds of sufficient amount to pay the note in controversy, principal and interest, on the day it became due? Answer: Yes.

5. Did the defendant, G. D. B. Reynolds, authorize the Stanly Bank and Trust Company to pay out of his funds in said bank to his credit the note of plaintiff if it should be presented on the day it became due for payment? Answer: No.

6. Is plaintiff's cause of action as against J. C. Parker barred by the three-year statute of limitations? Answer: No.

7. What amount, if any, is now due plaintiff on said note? Answer: ....

Upon the verdict as returned the court rendered judgment against the defendants for $500.00 with interest from 12 May, 1928. The defendant Parker excepted and appealed upon assigned error.

Brown & Brown for appellant.
T. B. Mauney for appellee.

ADAMS, J. The note was signed by Reynolds as principal and by Parker as surety. Judgment was recovered against both parties and the surety only appealed. The appellant excepted to the court's refusal to dismiss the action and to instructions given the jury, but he bases his appeal principally on sections embraced in Art. 7 of the Negotiable Instruments Law. C. S., 3051, *et seq.* Section 3069, provides that where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. Reynolds had on deposit in the Stanly Bank and Trust Company funds sufficient to pay the note with interest at the date of maturity, and the plaintiff failed to present the note at that time for payment by the bank. The appellant's contention is that in legal effect the note was paid and that both parties were discharged, there being an intimation that the plaintiff's failure to present the note for payment was itself a discharge.

In *Nichols v. Pool,* 47 N. C., 23, the note sued on was payable at the Branch Bank of the State of North Carolina at Elizabeth City. The Court (*Pearson, J.*), said: "The maker of a note owes the debt without any conditions about it. Why should the creditor agree to abridge his rights and have a condition precedent imposed on him, by force of which he will lose the entire debt if he fails to demand it at a particular time and place? Upon what ground could a debtor ask or a creditor submit to have any such restriction? If such is the intention of the parties, it ought to be expressed in unequivocal words, as "I promise to pay, etc., provided, or upon condition, or if this note is presented for payment at the bank in Elizabeth City on the day it falls due"; because the relation of creditor and debtor forbids the idea that the parties intend to make a condition precedent whereby the debt will be lost unless demanded at a given time and place; consequently, a construction by which the words 'payable at, etc.,' are by implication made to have this effect, and are converted into a condition precedent, is against the reason of the thing." The Court declared the effect to be that the creditor did not lose his debt by failing to apply for it at the precise time and place but might afterwards bring suit, and that the debtor might defeat the action by bringing into court the money he had deposited or if it was lost by failure of the bank he might put the loss on the creditor because of his laches in failing to present the note for payment. This case was decided on principles of the common law, but the Negotiable Instruments Law contains an accordant section (C. S., 3051), to the effect that presentment for payment is not necessary in order to charge the person primarily liable on the instrument. The person primarily liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same, all other parties being secondarily liable. C. S., 2977.

Suretyship is an undertaking to answer for the debt of another, by which the surety becomes bound as an original debtor is bound, and is therefore a primary obligation to see that the debt is paid; and as the Court has said in *Rouse v. Wooten,* 140 N. C., 557, "A surety comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the Negotiable Instruments Law, absolutely required to make payment. It is, therefore, manifest that the plaintiff's failure to have the note at the bank at the date of its maturity did not discharge the debt."

The appellant intimates that by virtue of the section 3069, the substance of which we have stated, it was the absolute duty of the bank to apply the deposit made by Reynolds to the payment of the note, but this question is academic for the reason that the note was not taken or sent to the bank at the date of maturity. The question is whether the mere deposit of the money was a payment which relieved the appellant of liability.

In *Peaslee v. Dixon,* 172 N. C., 411, the record shows that the note was payable at the Bank of Caswell. An employee of the bank presented the note to the defendant who was the maker and he wrote across the face of it the words, "charge my account. R. L. Dixon." The bank accepted this paper and closed its doors before remitting the money to the plaintiff. This was held to constitute a payment on the note. The maker of the note had expressly ordered the application.

The relation between the several parties to a note payable at a bank in which the maker has funds on deposit is set forth in *United States National Bank v. Shumak,* 172 Pac. (Mon.), 324, in the following words: "The note in question was by its terms payable at the Bridger Bank, and defendants insist that, in failing to charge the note to their account whenever they had funds sufficient to meet it, the Bridger Bank was guilty of negligence which is imputable to plaintiff. Section 5935, Revised Code, provides: 'Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.' The authorities which have construed this section of the Uniform Negotiable Instruments Law are quite generally agreed that it merely creates the bank the agent of the maker and does not authorize it to receive payment for the holder. 8 C. J., 602; 3 R. C. L., 1289. The duty which the bank owes to the maker arises from the relation of debtor and creditor, and not from the fact that it is the agent of the holder." The bank was not under the facts of this case an agent of the plaintiff and as to the plaintiff the appellant was not discharged by the deposit of the funds.

This, in our opinion, is the correct position, though we are not inadvertent to the suggestion, which has been severely criticised, that the maker of a note payable at a bank discharges his duty by keeping his account good, as in *Baldwin's Bank v. Smith,* 115 N. Y., 76.

The appellant contends that as Reynolds had on deposit in the bank enough money to pay the note his ability and readiness to pay it at maturity was equivalent to a tender of payment on his part. In C. S., 3051, there is a clause to this effect; but section 3102 restricts "a valid tender of payment by a prior party" to the discharge of persons secondarily liable, as endorsers. A surety, we have said, is primarily liable and is not released by the tender.

The result is that exceptions nine, ten, and eleven which embrace the statement of a contention, must be overruled. There was technical error, however, in the instructions given in reference to the fifth issue—

whether Reynolds authorized the bank to pay the note out of funds in the bank to his credit. The tenor of the instruction is that a special order verbal or written, made by Reynolds after the execution of the note was essential to authorize the bank to make payment. The note itself, the execution of which was admitted, as shown by the first issue, was "an order to the bank" to pay the note, and the fifth issue should have been answered in the affirmative as matter of law, or more properly should not have been submitted to the jury. The error for this reason was harmless. Moreover the note was not presented for payment and a special order by the maker would not have canceled the debt. Judgment Affirmed.

JOS. W. GRIER v. MARK WELDON.

(Filed 10 January, 1934.)

1. **Trial F a—Form and sufficiency of issues.**

   Issues submitted to the jury are sufficient if they arise upon the pleadings and present to the jury all essential or determinative facts in controversy, the issues being largely in the discretion of the court, and where they are not prejudicial and do not affect a substantial right an exception thereto will not ordinarily be sustained.

2. **Chattel Mortgages A c—Where paper is in effect a chattel mortgage it will be so construed regardless of its form.**

   A paperwriting, whatever its form, will be construed as a mortgage if by proper interpretation the intent is made to appear that it is to secure the payment of a debt in a certain amount and creates a lien upon sufficiently described property, the lien to be discharged upon payment of the debt according to its terms.

3. **Chattel Mortgages D a—Where mortgagor retains possession under implied agreement, mortgagee may not take possession until default.**

   Where a farmer buys a mule and gives the seller a chattel mortgage to secure the balance of the purchase price and thereafter uses the mule in the cultivation of his crops, there is at least an implied agreement that the mortgagor should have possession of the mule, and where upon the debt falling due, the parties agree upon an extension of time for payment until after the harvesting of the next fall crop, the debt is not due until the expiration of the extension agreement, and where the mortgagee takes possession by claim and delivery prior to the expiration of the extension agreement, his possession is wrongful, and the mortgagor may recover the difference between the value of the mule at the time of such seizure and the unpaid balance of the purchase price. The sufficiency of consideration for the extension agreement is not presented in this case, but *semble* there was sufficient consideration.

4. Same—Mortgagee is entitled to immediate possession unless there is express or implied agreement by parties to the contrary.

Under the common law, which prevails in North Carolina, a chattel mortgage passes the legal title to the property pledged to the mortgagee, defeasible by the subsequent performance of its conditions, and the mortgagee is entitled to immediate possession of the property unless there is an express or implied agreement by the parties to the contrary.

APPEAL by plaintiff from *Hill, Special Judge,* and a jury, at May Special Term, 1933, of MECKLENBURG. No error.

This was a civil action brought by plaintiff to recover $94.34, balance due on note against defendant and the ancillary proceeding taken out of claim and delivery for the possession of a mule, the note being secured by a lien on the mule.

The following is a copy of the instrument sued on: "$130.00—Charlotte, N. C., 14 March, 1931. One day after date I promise to pay Jos. W. Grier or order one hundred and thirty dollars, value received, with interest from date at the rate of six per cent per annum. This note is given for one yellow bay colored mare mule about 10 years old bought from Jos. W. Grier and I hereby agree that said bay mare mule is and shall remain the property of the said Jos. W. Grier until this note is paid in full. And if I fail to pay said debt and the interest according to said note, then they may sell said property, or so much thereof as may be necessary, by public auction at the county courthouse door, for cash, first giving twenty (20) days notice of time, place, and terms of said sale at the county courthouse door and three (3) other public places in the county and apply the proceeds of such sale to the discharge of said debt, and interest on same, and pay any surplus to me. Witness my hand and seal. Mark Weldon (seal) X his mark. Witness C. J. Lee."

The plaintiff alleged the balance owing on said note and mortgage to be $94.34, and contended that said amount was due and unpaid. The defendant denied the plaintiff's allegation, and alleged the balance owing on said note and mortgage was $64.00, and further alleged that he had an agreement with the plaintiff before he pitched his crop in 1932 that the plaintiff would carry said $64.00 until the fall of 1932, and in his further answer and defense prayed for relief against the loss of the mule by way of injunction, and set up a counterclaim for damages to his crop. The defendant at the time of the trial abandoned his counterclaim for damages to crop for that injunctive relief was denied, and the mule had been disposed of, and only asked for recovery of the difference between what was owing on the note and the value of the mule as of the date of the seizure.

The judgment on the verdict is as follows:

"This cause coming on to be heard and being heard before his Honor, F. S. Hill, judge presiding, and a jury, at the May Special Term, of Superior Court of Mecklenburg County, 1933, and the issues submitted to the jury having been answered as follows:

1. In what sum, if any, is the defendant indebted to the plaintiff by reason of the note sued on? Answer: $64.00

2. Was said note secured by chattel mortgage, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff contract and agree with the defendant to extend the time for payment of said note until the fall of 1932, as alleged in the answer? Answer: Yes.

4. Is the plaintiff the owner and entitled to possession of the mule taken in claim and delivery by him in this action, as alleged? Answer: No.

5. What was the reasonable market value of said mule at the time same was turned over to the plaintiff by the sheriff under writ of claim and delivery herein? Answer: $150.00.

It is now, therefore, ordered, adjudged and decreed by the court that the defendant recover of the plaintiff the sum of $81.46, the difference owed by the defendant in the first issue with interest from 14 March, 1931, to the date of seizure on 20 May, 1932, and the value of the mule found by the jury at the time of delivery by the sheriff under writ of claim and delivery, as found in the fifth issue, said $81.46 to bear interest from 20 May, 1932, until paid. It is further ordered by the court that the plaintiff pay the cost of this action to be taken by the clerk."

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary ones and pertinent facts will be considered in the opinion.

Fred C. Hunter for plaintiff.
A. A. Tarlton for defendant.

CLARKSON, J. The plaintiff objected and assigned error to the submission of the issues and tendered other issues. We think that the issues as submitted arise on the pleadings and present to the jury inquiries as to all the essential matters or determinative facts in dispute.

In *Hooper v. Trust Co.,* 190 N. C., 423 (428), speaking to the subject, we find: "The test of the sufficiency of issues is, 'did the issues afford the parties opportunity to introduce all pertinent evidence and apply it fairly?' *Tuttle v. Tuttle,* 146 N. C., 484; *Deloache v. Deloache,* 189 N. C., 394, 400; *Elliott v. Power Co., ante,* 62. When issues meet the test they satisfy all the requirements of *Rudasill v. Falls,* 92 N. C., 222, and *Gordon v. Collett,* 104 N. C., 381." *Erskine v. Motor Co.,* 187 N. C., 826 (831-2).

Issues submitted are largely in the discretion of the court below, and if not prejudicial or affect a substantial right ordinarily an exception and assignment of error will not be sustained as in the present case.

"To constitute a mortgage, no particular words are necessary 'If a security for money is intended, that security is a mortgage, though not having on its face the form of a mortgage; it is the essence of a mortgage that it is a security.' Jones Chattel Mortgage, sec. 24. *McCoy v. Lassiter,* 95 N. C., 88, 92. While 'no particular form is necessary to constitute a mortgage,' Yet the words must clearly indicate the creation of a lien, specify the debt to secure which it is given, and upon the satisfaction of which the lien is to be discharged, and the property upon which it is to take effect.' 'The statement that the creditor is to have a lien, and that on default he may take possession and sell, . . . sufficiently discloses the intent.' *Harris v. Jones,* 83 N. C., 318." *Britt v. Harrell,* 105 N. C., 10, 12.

The court below charged "If you believe all the evidence and by its greater weight it will be your duty to answer the second issue 'Yes.'" In this we can see no error.

The defendant testified, in part: "I owe Mr. Grier a balance of $64.00 on the mule. Before I planted my crop last year I had an understanding with Mr. Grier as to how I would pay the balance. After I had paid up to November $96.00, I told Mr. Grier I had gathered all of my vegetables and paid him all that I was able to pay and I had come to see him to see if I couldn't make some arrangements with him to carry this $64.00 over for me, and if he wouldn't let me know so I could get some one to lift part of the payments for me. He said 'I will carry you over. I wouldn't dare take the mule away from you as nice as you have taken care of him. It shows that you respect him.'"

On this aspect the court below gave the contentions of both parties, and charged the jury: "Did the plaintiff, Joseph W. Grier, agree to extend the time for payment of the note, as defendant contends and alleges? That is a question of fact for you to determine from all the evidence. The burden is upon the defendant to satisfy you from the evidence, and by its greater weight, that there was such an agreement, and that such an agreement existed." There is no exception or assignment of error by plaintiff to the evidence or charge on this issue. If there was such an agreement made, there is no contention that there was no consideration to support it.

In *Exum v. Lynch,* 188 N. C., 392 (395), it is said: "Generally speaking, it may be said that the term 'consideration,' in the sense it is used in legal parlance, as affecting the enforceability of contracts, consist either in some right, interest, gain, advantage, benefit or profit accruing to one party, usually the promisor, or some forbearance, detriment, prejudice, inconvenience, disadvantage, loss or responsibility, act, or service given, suffered, or undertaken by the promisee. *Institute v. Mebane,* 165 N. C., 644. It is usually sufficient to define it as a benefit to the promisor, or a detriment to the promisee. *Cherokee Co. v. Meroney,* 173 N. C., 653; *Findly v. Ray,* 50 N. C., 125; 6 R. C. L., 654; 13 C. J., 311."

The plaintiff excepts and assigns error to the following portions of the charge below, which we cannot sustain: "The court instructs you if you answer the third issue Yes, then it having admitted that the mule was seized by plaintiff in this action in May, 1932, that under that state of facts plaintiff would have seized the property before the indebtedness became due, then he would not be the owner of the mule as of that date, or entitled to possession as of that date. . . . If the debt was due, and under the terms of the note offered in evidence, he would have a right to seize the property, but if the debt was not due until sometime after that, and the property still in the possession of the defendant, then plaintiff would not be entitled to possession of the property in May, 1932."

Jones Chattel Mortgages and Conditional Sales, Vol. 2 (6th ed., 1933), part sec. 426, p. 175: "The right of possession of mortgaged chattels vests in the mortgagee immediately upon the execution of the mortgage *if there be no express or implied stipulation in it to the contrary,* whether the mortgage debt be due and payable or not." (Italics ours.)

"In North Carolina and many other states the common law prevails, and the mortgage deed passes the legal title at once, defeasible by the subsequent performance of its condition. The title then draws the right of possession, and the mortgagee may enter into possession of the property at once or at any time *unless restrained by express provision or necessary implication,* which does not appear in the cases before us. 1 Jones Mortgages, sec. 58." *Hinson v. Smith,* 118 N. C., 503, 505. The right of possession of mortgaged chattels vests in the mortgagee immediately upon the execution of the mortgage, *if there is no express or implied stipulation in it to the contrary,* whether the mortgage debt be due and payable or not. . . . The right of possession follows the right of property. *Hinson v. Smith, supra.*

In the present case we think the evidence was to the effect that if there was not an express, there was at least an implied stipulation that the mortgagor should have possession of the "yellow bay colored mare mule," to make his crop and keep possession of the mule until the fall of 1932. The jury so found on the third issue. *Harris v. R. R.,* 190

N. C., 480 (483). We do not think *Jackson v. Hall,* 84 N. C., 489, or *S. v. Stinnett,* 203 N. C., 829, applicable. See *Narron v. Chevrolet Co., ante,* 307.

The exception and assignment of error as to the charge on the greater weight of the evidence cannot be sustained—it is too technical. The able judge in the court below tried the case with care and in accordance with the law in this jurisdiction. For the reasons given, in the judgment of the court below, we find

No error.

J. M. LOGAN, RECEIVER OF FIRST NATIONAL BANK OF CHARLOTTE, N. C., AND JOHN D. SHAW, TRUSTEE, v. E. C. GRIFFITH AND WIFE, FRANCES GRIFFITH; THAD L. TATE, AND F. O. CLARKSON, TRUSTEE.

(Filed 10 January, 1934.)

1. **Taxation H b—N. C. Code, 8028, provides exclusive remedy of individual on tax certificate and limitation therein prescribed applies.**

   N. C. Code of 1931, sec. 8028, provides an exclusive remedy of an individual on a tax sale certificate, and the limitation therein prescribed for bringing action thereon applies, and an individual bringing action based on a tax sale certificate may not avail himself of the fact that no limitation is prescribed in C. S., 7990, by alleging that the tax certificate was assigned him by the county and that the action was brought under section 7990.

2. **Same: Limitation of Actions E c—**

   Limitation on foreclosure of tax sale certificate cannot be taken advantage of by demurrer. C. S., 405.

CIVIL ACTION, before *Cowper, Special Judge,* at January Term, 1933, of MECKLENBURG.

It was alleged that Mr. L. W. Humphrey returned for taxation his land in Mecklenburg County for the year 1928, and that having failed to pay the taxes the land was duly sold in June, 1929, at which sale Mecklenburg County became the highest bidder at said sale for the amount of taxes and penalties then due by the said L. W. Humphrey for his 1928 taxes in the sum of $440.27. That thereafter on 13 November, 1930, the First National Bank paid to the county of Mecklenburg the sum of $507.78, and in consideration therefor the county of Mecklenburg duly assigned the tax sale certificate describing the tract of land to John D. Shaw, trustee for the First National Bank of Charlotte, N. C., and the "said First National Bank thereby acquired the lien of the county of Mecklenburg for 1928 taxes of L. W. Humphrey." It was further alleged that subsequently E. C. Griffith bought the land subject to taxes due or which might be a lien thereon, and that on 23

September, 1923, Griffith and wife borrowed from his codefendant, Thad L. Tate, the sum of $5,350, and as security executed and delivered to the defendant, F. O. Clarkson, trustee, a deed of trust upon the property. It is further alleged that the amount of said taxes "is a lien upon the real estate hereinafter described, having precedence over the deed of trust of F. O. Clarkson, trustee." The twelfth allegation of the complaint is substantially as follows: "That this action is brought under the provisions of section 7990 of the Consolidated Statutes of North Carolina, in the nature of an action to foreclose a mortgage for the purpose of foreclosing the lien of the said taxes upon the real estate hereinbefore described, and that the plaintiffs are informed and believe that the defendants herein are all parties having any interest in said real estate, other than the lien of said taxes which is owned and held by the plaintiffs."

The prayer for relief is as follows: "Wherefore, the plaintiffs pray for a judgment of foreclosure of the tax lien, and the enforcement thereof, in accordance with said section 7990 of the Consolidated Statutes, for the appointment of a commission of the court to sell the real estate hereinbefore described for the payment of said tax lien, for the costs of this action, and for such other and further relief as the plaintiffs may be entitled to in the premises."

The defendants filed a demurrer. The grounds of the demurrer are as follows: 1. "It appears upon the face of said complaint that the cause of action therein set forth is based upon the provisions of section 7990 of the Consolidated Statutes of North Carolina, being an action to foreclose a lien for taxes in the nature of an action to foreclose a mortgage, when as a matter of fact the remedy sought to be enforced under said section is no longer available to plaintiffs, said remedy having been either repealed or merged into the remedy to foreclose tax sale certificate, as set forth in North Carolina Code of 1931, section 8028, *et seq.*"

2. "That section 8028 of the North Carolina Code of 1931, now constitutes the sole right and only remedy for foreclosing a tax sale certificate, and that it appears upon the face of the complaint that the time had expired upon the date of the commencement of this action for the bringing of said suit according to the provisions of said section 8028," etc.

3. "That C. S., 7990, reserved a remedy for governmental subdivisions and not for individuals."

The trial judge sustained the demurrer and the plaintiffs appealed.

John M. Robinson and Hunter M. Jones for plaintiffs.
Taliaferro & Clarkson for defendant.

BROGDEN, J. Can the owner of a tax sale certificate maintain an action of foreclosure after the lapse of eighteen months from the date of the certificate?

The applicable statutes create a lien for purchasers at tax sales, and also prescribe the procedure for enforcing said lien. "Foreclosure" is the process provided for turning the lien into money. Whether such lien be a plain lien arising from the bare purchase at the sale or payment of taxes or such as may be evidenced by a certificate of sale executed by the proper officers, the sovereign may proceed under C. S., 7990, to foreclose the lien, in which event no statute of limitations is applicable. But even if the sovereign elects or chooses to foreclose the sale certificate, C. S., 8037, sets the time clock on eighteen months from the date of the certificate, and after the lapse of that period, the remedy is ineffective. *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808; *Shale Products Co. v. Cement Co.,* 200 N. C., 226, 156 S. E., 777; *Wilkes County v. Forester,* 204 N. C., 163.

It appears from the complaint that the First National Bank of Charlotte purchased the tax sale certificate from the county of Mecklenburg, and that thereafter the bank failed and the plaintiff as receiver thereof instituted an action to sell the land of the defendant upon the theory that the tax sale certificate constituted a prior lien upon the premises. In paragraph twelve of the complaint the plaintiff declares that the action is brought in accordance with C. S., 7990, but in paragraph eight it is alleged that the plaintiff bank duly took an assignment of a tax sale certificate for the property "and the First National Bank thereby acquired the lien of the county of Mecklenburg for 1928 taxes of L. W. Humphrey upon the real estate." Consequently, interpreting the complaint as a whole, it appears that the tax sale certificate is in fact the basis of the cause of action. The North Carolina Code, 1931, section 8028, declares in plain English that a holder of a tax sale certificate "shall have the right of foreclosure of said certificate of sale by civil action, and this shall constitute the sole right and only remedy to foreclose the same."

It appears from the complaint that the sale was made in June, 1929, and that the plaintiffs acquired the certificate in November, 1930, and that the action was brought on 28 January, 1932. Hence, the sole remedy available to plaintiff upon his certificate was barred at the time the action was instituted.

Notwithstanding, the judgment must be reversed, because the defendant cannot take advantage of the bar of the statute of limitations by demurrer. C. S., 405.

Reversed.

G. L. EFIRD v. J. B. LITTLE AND HIS WIFE, RUTH B. LITTLE, J. A. LITTLE, FLOYD C. TEETER, H. C. TURNER, AND D. L. CROWELL.

(Filed 10 January, 1934.)

1. **Bills and Notes E a—Substitution of endorser is material alteration releasing endorsers not consenting thereto.**

   Where the payee of a negotiable instrument acquires it with certain endorsers thereon and subsequently strikes out the name of one endorser and another signs as endorser in lieu of the endorser whose name was stricken out, the change is a material one and will release the endorsers who had not consented to the substitution, but will not release those endorsers whose consent had been procured. C. S., 3106, 3107.

2. **Same—Alteration by substitution of endorsers does not release substituted endorser in absence of misrepresentation.**

   Where an endorser as originally appearing on a negotiable note has his name stricken from the instrument by the payee and another person signs in substitution for him, the liability of the substituted endorser to the payee remains as a general endorser, unaffected by the cancellation and substitution, C. S., 3047, when his signature is not obtained by misrepresentation that the other endorsers had consented to the substitution and remained bound by the instrument.

APPEAL by defendants, J. A. Little, and D. L. Crowell, from *Harding, J.*, at May Term, 1933, of STANLY. No error.

This is an action to recover on a note for $1,000, which is payable to the order of the plaintiff. The note was executed by the defendants, J. B. Little, and his wife, Ruth B. Little, as makers, and by the defendants, J. A. Little, Floyd C. Teeter, H. C. Turner and D. L. Crowell, as endorsers. It was dated 14 February, 1928, and was due on 14 February, 1929. Interest was paid on the note up to and including 14 February, 1931.

At the date of its delivery to the plaintiff, the note sued on was endorsed by the defendants, J. A. Little, Floyd C. Teeter, and H. C. Turner, and also by C. I. Moose. Subsequent to its delivery, and while he was the holder of the note, the plaintiff canceled therefrom the name of C. I. Moose, as an endorser. After such cancellation, the defendant, D. L. Crowell, wrote his name on the back of the note, as an endorser. This was done for the purpose of substituting D. L. Crowell as an endorser of the note for C. I. Moose. It was alleged in the complaint that the cancellation and substitution was made with the consent of all the parties to the note.

Issues submitted to the jury were answered as follows:

"1. Did the defendants, J. B. Little and his wife, Ruth B. Little, execute the note sued on as alleged in the complaint? Answer: Yes.

2. Did the defendants, J. A. Little, Floyd C. Teeter and H. C. Turner and C. I. Moose endorse said note as alleged in the complaint? Answer: Yes.

3. Was the substitution of the name of the defendant, D. L. Crowell, for the name of C. I. Moose made with the knowledge and consent of the defendant, J. A. Little, as alleged in the complaint? Answer: Yes.

4. Was the substitution of the name of the defendant, D. L. Crowell, for the name of C. I. Moose made with the knowledge and consent of H. C. Turner as alleged in the complaint? Answer: No.

5. Was the substitution of the name of the defendant, D. L. Crowell, for the name of C. I. Moose made with the knowledge and consent of the defendant, Floyd C. Teeter, as alleged in the complaint? Answer: No.

6. Did the defendant, D. L. Crowell, sign said note in lieu of C. I. Moose after the name of C. I. Moose had been scratched out by the plaintiff as alleged in the complaint? Answer: Yes.

7. Was the defendant, D. L. Crowell, induced to sign said note as endorser in lieu of C. I. Moose, by representations made to him by the plaintiff that the substitution of D. L. Crowell as an endorser in lieu of C. I. Moose would be satisfactory to the other endorsers thereon? Answer: No.

8. What amount is now due and unpaid on said note? Answer: $1,000, less double the amount of usurious interest found by the jury in answer to the 10th issue, to wit: $72.00; and less $4.00, credited on the note on 30 July, 1931, as part of the $40.00 credit appearing on the note.

9. Did the plaintiff take, receive, and reserve a greater rate of interest than six per cent per annum on the $1,000 note set out in the complaint as alleged in the answer? Yes.

10. What amount, if any, has the defendant, J. B. Little, paid by way of usurious interest to the plaintiff on said note? Answer: $36.00."

From judgment that plaintiff recover nothing of the defendants, Floyd C. Teeter and H. C. Turner, and that he recover of the defendants, J. B. Little and his wife, Ruth B. Little, J. A. Little and D. L. Crowell, jointly and severally, the sum of $924.00, with interest from the date of the judgment, and the costs of the action, the defendants, J. A. Little and D. L. Crowell, appealed to the Supreme Court.

Morton & Smith for plaintiff.
O. J. Sikes and A. C. Huneycutt for defendants.

CONNOR, J. The cancellation by the plaintiff of the name of C. I. Moose as an endorser on the note held by him, and sued on in this action, was a material alteration, and rendered the note void as to all parties thereto, except such as consented to the cancellation. C. S., 3106 and C. S., 3107. *Davis v. Coleman,* 29 N. C., 426.

The defendants, Floyd C. Teeter and H. C. Turner, did not consent to the cancellation or to the substitution of the name of the defendant, D. L. Crowell, as an endorser for the name of C. I. Moose. For this reason, the note is void as to these defendants, and there is no error in the judgment that plaintiff recover nothing of the defendants, Floyd C. Teeter and H. C. Turner.

The defendant, J. A. Little, who was an endorser of the note at the date of its delivery to the plaintiff, consented to the cancellation, and to the substitution of the name of the defendant, D. L. Crowell as an endorser for the name of C. I. Moose, who was an original endorser. For this reason, he was not released from his liability on the note as an endorser by the cancellation and substitution. The note was not rendered void as to this defendant by the alteration, although material. There is no error in the judgment that plaintiff recover of the defendant, J. A. Little, the amount found by the jury to be due on the note. As to him, the judgment is affirmed.

The defendant, D. L. Crowell, wrote his name on the back of the note, as an endorser, after the name of C. I. Moose had been scratched out by the plaintiff. He was not induced to do so by representations made to him by the plaintiff that the cancellation and substitution was satisfactory to the other endorsers, as he alleged in his answer. His liability as an endorser was not affected by the cancellation. He became liable on the note as a general endorser, C. S., 3047, and remained liable as such. There is no error in the judgment that plaintiff recover of the defendant, D. L. Crowell, the amount found by the jury to be due on the note. As to him the judgment is affirmed.

The issues submitted to the jury are raised by the pleadings. The answers to these issues support the judgment, which is therefore affirmed.

No error.

ANDREWS-COOPER LUMBER COMPANY v. B. M. HAYWORTH AND HIS WIFE, DELPHIA HAYWORTH, AND GURNEY LOFLIN AND J. R. HAWKINS.

(Filed 10 January, 1934.)

Laborers' and Materialmen's Liens B c: Payment C a—Owner must prove payment prior to notice, and delivery of cashier's check is not payment.

In an action by a materialman against the owner of property to enforce his lien acquired according to statutory provisions, the burden is on the owner to show that he had paid the contractor the full amount due on the contract prior to the serving of the statutory notice on the owner and the filing of the lien when this defense is relied on by the owner, and where the only evidence of payment is that the owner delivered a cashier's check to the contractor for the amount of the contractor's claim, the materialman is entitled to a directed verdict on the issue as to payment of the contractor, the delivery and acceptance of the cashier's check being only conditional payment in the absence of an agreement by the parties that it should constitute payment.

APPEAL by plaintiff from *Sink, J.,* at September Term, 1933, of GUILFORD. Reversed.

This action was begun and tried in the municipal court of High Point.

The plaintiff, a corporation organized under the laws of this State, is engaged in the business of manufacturing and selling, at retail, lumber and building materials, in the city of High Point, N. C.

During the fall of 1931, the plaintiff sold and delivered to the defendants, Gurney Loflin and J. R. Hawkins, lumber and building materials which were used by the said defendants in the construction of a house on lands in Davidson County, North Carolina, which are owned by the defendants, B. M. Hayworth and his wife, Delphia Hayworth. The construction of the said house was completed, according to the contract entered into by and between the defendants, on or about 1 January, 1932. On 5 January, 1932, the defendants, B. M. Hayworth and his wife, Delphia Hayworth, were indebted to their codefendants in the sum of $1,000, the said sum being the balance due on the contract for the construction of said house, and the defendants, Gurney Loflin and J. R. Hawkins were indebted to the plaintiff in the sum of $1,000, the said sum being the amount due for lumber and building materials used by said defendants in the construction of said house for their codefendants.

On 25 February, 1932, the plaintiff served a notice, in writing, on the defendants, B. M. Hayworth and his wife, Delphia Hayworth, that plaintiff claimed a lien on the house constructed for said defendants by their codefendants in the sum of $1,000, and attached to said notice an itemized statement of the lumber and building materials which the plaintiff had sold and delivered to the defendants, Gurney Loflin and J. R. Hawkins, and which had been used by said defendants in the construction of said house.

On 26 February, 1932, the plaintiff filed in the office of the clerk of the Superior Court of Davidson County a lien on the said house and on the lands on which the said house is located, for the sum of $1,000.

This action was begun on 4 April, 1932, to recover of the defendants the sum of $1,000, with interest on said sum from 1 January, 1932, and to enforce plaintiff's statutory lien on the house and lot described in the complaint.

The defendants, B. M. Hayworth and his wife, Delphia Hayworth, in their answer, admitted that they were indebted to their codefendants, Gurney Loflin and J. R. Hawkins, on 5 January, 1932, in the sum of $1,000, as alleged in the complaint. They alleged, however, that they had paid said sum to the said defendants on said day, and for that reason were not indebted to them or to the plaintiff at the date of the commencement of this action.

The issues raised by the pleadings and submitted to the jury were answered as follows:

"1. Did the defendant, B. M. Hayworth, enter into a contract with the defendants, Gurney Loflin and J. R. Hawkins, to build a house as alleged in the complaint? Answer: Yes.

2. Did the defendant, Delphia Hayworth, wife of B. M. Hayworth, consent to and ratify said contract? Answer: Yes.

3. What amount was remaining due and unpaid on said contract on 5 January, 1932? Answer: $1,000, with interest from 1 January, 1932.

4. Was the cashier's check offered in evidence payment of said balance due under said contract? Answer: Yes.

5. Is the plaintiff entitled to a lien on the property described in the complaint for the balance due on said contract? Answer: ...."

From judgment that plaintiff recover nothing of the defendants, B. M. Hayworth and his wife, Delphia Hayworth, and that said defendants recover of the plaintiff their costs incurred in this action, the plaintiff appealed to the Superior Court of Guilford County, assigning errors in the trial. At the hearing of this appeal, plaintiff's assignments of error were not sustained.

From the judgment of the Superior Court affirming the judgment of the municipal court of High Point, the plaintiff appealed to the Supreme Court.

David H. Parsons for plaintiff.
T. W. Albertson and M. W. Nash for defendants.

CONNOR, J. The answer to the 4th issue submitted to the jury at the trial of this action in the municipal court of High Point is determinative of the right of the plaintiff to recover of the defendants, B. M. Hayworth and his wife, Delphia Hayworth, on the cause of action alleged in the complaint. These defendants admit in their answer that they were indebted to their codefendants, Gurney Loflin and J. R. Hawkins, on 5 January, 1932, in the sum of $1,000. They allege that they paid said sum on said day. The burden was on the said defendants to sustain this defense. In apt time, the plaintiff requested the trial court to instruct the jury that if they believed the evidence pertinent to the 4th issue, they would answer the said issue, "No," and excepted to the refusal of the court to so instruct the jury. On its appeal to the Superior Court, the plaintiff assigned as error the refusal of the trial court to instruct the jury as requested by it. This assignment of error was overruled by the Superior Court, and on its appeal to this Court, the plaintiff assigns same as error. The plaintiffs by this assignment of error presents to this Court its contention that there was no evidence at the trial in the municipal court of High Point, which tended to show that the defendants, B. M. Hayworth and his wife, Delphia Hayworth, paid the amount due by them to their codefendants, Gurney Loflin and J. R. Hawkins, on 5 January, 1932, as the said defendants alleged. This contention is sustained. There was no evidence at the trial in the municipal court of High Point which tends to show that at the time the defendants, B. M. Hayworth and his wife, Delphia Hayworth, delivered the cashier's check to their codefendants, Gurney Loflin and J. R. Hawkins, it was agreed by and between said defendants that the said cashier's check was delivered and accepted in full payment and discharge of the amount then due by said defendants to their codefendants. It is well settled that in the absence of such agreement, the delivery and acceptance of the cashier's check was only a conditional payment of the debt. *South v. Sisk, post,* 655; *Dewey v. Margolis,* 195 N. C., 307, 142 S. E., 22; *Hayworth v. Ins. Co.,* 190 N. C., 757, 130 S. E., 612; *Graham v. Warehouse,* 189 N. C., 533, 127 S. E., 540; *Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3; 48 C. J., 617; 21 R. C. L., 60.

All the evidence showed that the defendants, Gurney Loflin and J. R. Hawkins, received the cashier's check at about 8:30 p.m., on 5 January, 1932, and caused the same to be presented to the drawee bank for payment on the morning of 6 January, 1932. Payment was then refused by said bank, and thereafter the check was tendered to the defendants, B. M. Hayworth and his wife, Delphia Hayworth, who declined to accept the same. There was no evidence tending to show that upon a further presentment of the check to the bank it would have been paid. All the evidence was to the contrary.

There was error in the refusal of the Superior Court to sustain plaintiff's assignment of error based on its exception to the refusal of the trial court to instruct the jury as requested by the plaintiff with respect to the 4th issue submitted to the jury. For this error the judgment of the Superior Court must be and is

Reversed.

LONNIE BYRD v. TIDEWATER POWER COMPANY.

(Filed 10 January, 1934.)

1. **Evidence J a—Unwritten part of contract not required to be in writing may be shown by parol when not in contradiction of written part.**

   Parol evidence that the agent of a corporation for the purpose of selling its stock was expressly authorized and directed to tell proposed purchasers that if they would buy stock the corporation would repurchase it at any time upon the purchaser's demand at a certain price, and that plaintiff purchaser bought the stock upon this agreement, *is held* admissible in evidence although no such agreement was contained in the written stock subscription contract signed by the purchaser, it not being required that a contract for the sale of stock should be in writing, C. S., 1164, and the parol part of the contract not being in contradiction of the written terms.

2. **Estoppel C a—Acceptance of dividends will not estop purchaser from declaring on seller's contract to repurchase stock at fixed price.**

   The purchaser of stock is not estopped from bringing action on the seller's agreement to repurchase the stock at a fixed price upon demand by the purchaser by accepting dividends thereon after demand upon the seller to repurchase in accordance with the terms of the agreement, the purchaser being entitled to the dividends so long as he owns the stock.

APPEAL by defendant from *Devin, J.,* at May Term, 1933, of BLADEN. No error.

This is an action to recover of the defendant the sum of $960.00, on the cause of action alleged in the complaint.

It is alleged in the complaint that contemporaneously with the purchase by the plaintiff from the defendant of ten shares of its preferred stock, in December, 1930, the defendant contracted and agreed with the plaintiff that defendant would, at any time when requested to do so by the plaintiff, repurchase said shares of stock from the plaintiff, at $96.00 per share. This allegation is denied in the answer.

It is further alleged in the complaint that some time during the spring of 1932, the plaintiff requested the defendant to repurchase the said shares of stock from him, and to pay therefor the sum of $960.00, and that defendant failed, neglected and refused to purchase said shares of stock from the plaintiff. This allegation is admitted in the answer.

The issues submitted to the jury at the trial were answered as follows:

"1. Is the plaintiff entitled to refund on the 10 shares of the preferred stock of the defendant corporation, upon surrender of the certificate for said shares, as alleged in the complaint? Answer: Yes.

2. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $960.00."

From judgment that plaintiff recover of the defendant the sum of $960.00, with interest from 1 May, 1933, and the costs of the action, the defendant appealed to the Supreme Court.

Henry L. Williamson for plaintiff.
L. R. Varser, R. A. McIntyre and O. L. Henry for defendant.

CONNOR, J. The plaintiff is a resident of Elizabethtown, in Bladen County, North Carolina. He was during the month of December, 1930, and is now engaged in business in Elizabethtown as a jeweler and merchant. The defendant is a corporation organized under the laws of this State, with its principal place of business at Wilmington, in New Hanover County, North Carolina. During the month of December, 1930, T. C. Connor was an agent and employee of the defendant. As such agent and employee, he had authority to sell shares of stock in the defendant corporation, and was directed by the defendant to solicit subscriptions for such shares of stock.

On or about 8 December, 1930, the said T. C. Connor solicited the plaintiff at his place of business in Elizabethtown, to purchase shares of the preferred stock of defendant at $98.00 per share. As the result of such solicitation, the plaintiff subscribed for ten shares of said preferred stock, and agreed to pay for said shares the sum of $980.00. The subscription agreement was in writing and is signed by the plaintiff. Pursuant to said subscription, the defendant sold to plaintiff ten shares of its preferred stock, and upon receiving payment in full for said shares of stock, delivered to the plaintiff, through the mail, a certificate for the same. There is no provision in either the subscription agreement or in the certificate for the repurchase by the defendant of said shares of stock, at the request of the plaintiff. It is provided in the certificate, however, that said shares of stock are redeemable by the defendant, at its option, at any time, at the price of $110.00 per share.

There was evidence at the trial tending to show that during the negotiations between the agent and employee of the defendant and the plaintiff, which resulted in the purchase by plaintiff from the defendant of the ten shares of preferred stock, the said agent, as he had been expressly authorized and directed by the defendant to do, told the plaintiff that if he would purchase said shares of preferred stock at $98.00 per share, the defendant would at any time after such purchase, at the request of the plaintiff, repurchase said shares of stock, and pay therefor $96.00 per share. Both the plaintiff and the agent of the defendant testified to this effect. The defendant in apt time objected to the admission of this testimony as evidence tending to prove the contract between the plaintiff and defendant as alleged in the complaint, and on its appeal to this Court assigns the admission of said testimony as error. This assignment of error cannot be sustained.

The principle of law applicable in the instant case is stated in *Fertilizer Co. v. Eason,* 194 N. C., 244, 139 S. E., 376, as follows:

"If a contract is not within the statute of frauds the parties may elect to put their agreement in writing, or to contract orally, or to reduce some of the terms to writing and leave the others in parol. If a part be written and a part verbal, that which is written cannot ordinarily be aided or contradicted by parol evidence, but the oral terms, if not at variance with the writing may be shown in evidence; and in such case, they may supplement the writing, the whole constituting one entire contract. *Cherokee County v. Meroney,* 173 N. C., 653, 92 S. E., 616." The principle as thus stated has been approved and applied in *Roebuck v. Carson,* 196 N. C., 672, 146 S. E., 708, and in *Smithfield Mills, Inc., v. Stevens,* 204 N. C., 382, 168 S. E., 201.

There is no provision in the law of this State which requires that a contract for the sale or purchase of shares of the stock of a corporation shall be in writing or evidenced by writing. Such shares of stock are declared by statute to be personal property, C. S., 1164, and may be sold or purchased by the corporation which has created them. *Blalock v. Mfg. Co.,* 110 N. C., 99, 14 S. E., 501.

The receipt and acceptance by the plaintiff of dividends on the shares of stock owned by him, subsequent to his request that defendant repurchase said shares, and subsequent to the commencement of this action, does not estop the plaintiff from enforcing the contract as alleged by him in his complaint. The plaintiff was entitled to said dividends so long as he was the owner of the shares of stock on which the dividends were declared. He cannot be estopped, in law or in equity, from taking what was his own.

There was no error in the trial of this action. The judgment is affirmed.

No error.

STATE v. J. M. RIDDLE AND E. F. HUFFMAN.

(Filed 10 January, 1934.)

1. **Criminal Law I j—Prosecuting witness's unequivocal identification of defendants as perpetrators of crime precludes nonsuit.**

   Where the prosecuting witness testifies that he was robbed by the use or threatened use of firearms, and unequivocally identifies defendants as the perpetrators of the crime, their motion as of nonsuit is properly overruled.

2. **Constitutional Law F a—Witness may testify as to identifying marks on defendant's body.**

   The constitutional guarantee that a defendant shall not be compelled to testify against himself, Art. I, sec. 11, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime.

3. **Same—Instruction in this case as to defendant's right not to testify held without error.**

   An instruction that defendants had the right to testify or to decline to testify in their own behalf, and that their failure to testify should not be considered to their prejudice at any stage of the trial *is held* to be without error.

4. **Criminal Law J d—**

   A motion for a new trial for newly discovered evidence is addressed to the discretion of the trial court, and his refusal to grant the motion is not reviewable in the absence of abuse.

APPEAL by defendants from *Stack, J.,* at March Term, 1933, of GUILFORD. No error.

The defendants were prosecuted and convicted upon an indictment charging them with highway robbery by the use or threatened use of firearms whereby they took from the person of Austin Beasley a watch, money and checks of the value of $297.00. Public Laws, 1929, chap. 187, sec. 1. From the judgment pronounced the defendants appealed.

The State's evidence tended to show that the prosecuting witness, Austin Beasley, operated a repair shop on the High Point road about four miles from Greensboro and that on 3 February, 1933, about 9:00 o'clock at night, he received a telephone call requesting him to go into the country for the purpose of repairing a Ford car. In consequence of the call he drove seven miles and, finding no Ford car, he was attracted by the movements of a Buick car which seemed to be following him. Later a Ford car in which two men were riding came in sight and approached to the left of Beasley's car, when one of the men jumped upon the running board of Beasley's car, stopped it, and at the point of a pistol made Beasley get out, at the same time holding the muzzle of the pistol against Beasley's jaw. At this time the other man went through his pockets and took therefrom the articles charged in the indictment. After they left him Beasley returned and had a conference with officers and informed them that he had been robbed, giving a minute description of the assailants but not mentioning the name of either of the defendants. The next day, however, or the next night, he did give the names of the two defendants as the men who had made the assault.

The appellants pleaded not guilty and relied in part upon evidence tending to show an alibi. The evidence was conflicting and upon its submission to the jury the verdict was returned as stated.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

George A. Younce and Adam Younce for appellants.

ADAMS, J. The first, fourth, sixteenth, and nineteenth exceptions are clearly untenable and call for no discussion; and as to exceptions eleven and twelve it is manifest that the court could not have granted the motion for dismissal of the action without exercising arbitrary disregard of the State's evidence. Beasley testified unequivocally that the defendants were his assailants.

On the examination of John C. Storey, deputy sheriff, who was a witness for the State, the solicitor elicited the following testimony: "Q. Did you examine his (Riddle's) leg to see whether there was any bruise on it or not? A. Yes sir. Q. Was it there? A. There was. Q. Where was the bruise and what was the character of it? A. It was a bruise, I would not say it was cut; the skin was not broken; it looked more like, more of an indentation or a bruise, where it had possibly sorter scratched something." To this evidence the appellants excepted. The witness further stated in this connection that there was discoloration of the bruise which was about two inches long and that when the witness started to raise the left leg of the trousers Riddle rolled it up himself, admitting the scratch saying that he had received it on a bed.

It is fundamental, of course, that in criminal prosecutions no man shall be compelled to give evidence against himself. Const., Art. I, sec. 11. The appellant insists that the evidence was admitted in breach of this constitutional interdiction and cites as authority the case of *S. v. Jacobs,* 50 N. C., 259, in which it was held that during the trial of a criminal action the State had no right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free Negro. In that case the defendant was on trial. But in *S. v. Graham,* 74 N. C., 646, it was held that a prisoner who was under arrest for larceny but not on trial could be compelled by the officer having him in charge to put his foot in a track found in a field for the purpose of comparison; and in *S. v. Thompson,* 161 N. C., 238, it was held not to be duress to require a prisoner who was present at a coroner's inquest and was afterwards prosecuted for murder either to put his foot in certain footprints or to place himself in a position from which it could be determined whether he could have fired the fatal shot through a window and killed the deceased. Confessions which are not voluntary are generally rejected as evidence on the theory that they are induced by hope or fear; but independent facts ascertained by means of an involuntary confession may be admissible. *S. v. Graham, supra.* The distinction between the case of *S. v. Jacobs, supra,* and the present case is that in the former the prisoner, while on trial, was compelled to exhibit himself to the jury and in the latter the witness testifies as to the result of his inspection. *S. v. Garrett,* 71 N. C., 85; *S. v. Thompson, supra; S. v. Turner,* 32 L. R. A. (N. S.), 773. *Cf. S. v. Campbell,* 182 N. C., 911; *S. v. Hickey,* 198 N. C., 45. Exceptions 7 and 8, therefore, present no adequate cause for a new trial.

The court instructed the jury that the defendants had a legal right to testify or to decline to testify in their own behalf and that the fact that they did not testify should not be considered to their prejudice at any stage of the trial. In this instruction we discover no implication or suggestion, near or remote, that the defendants should have taken the witness stand in their own behalf; and in reference to the alibi the charge is equally free from error. For these reasons exceptions 14 and 15 must be overruled.

The seventeenth exception is addressed to the refusal of the judge to grant a new trial for newly discovered evidence. After the verdict was returned and before the judgment was pronounced the defendants claimed to have discovered new evidence upon which the verdict should be set aside. Upon the trial there was evidence tending to show that the prosecuting witness did not inform the officers on the night of the robbery that he knew the defendants were his assailants; and the newly discovered evidence was to the effect that he admitted at the time it was not the defendants who had assaulted him. Several witnesses were examined when the motion was made and it is apparent upon the record that his Honor, without in any manner abusing his discretion, gave the matter careful and deliberate consideration.

In *Vest v. Cooper,* 68 N. C., 132, the Court observed that it is as well settled as anything in the practice that the presiding judge may set aside a verdict and grant a new trial for newly discovered evidence in the exercise of his discretion, from which no appeal lies except in case of abuse. This rule has been uniformly observed in subsequent decisions. *Braid v. Lukins,* 95 N. C., 123; *S. v. Rhodes,* 202 N. C., 101; *S. v. Cox, ibid.,* 378; *S. v. Griffin, ibid.,* 517; *S. v. Moore, ibid.,* 841; *S. v. Lea,* 203 N. C., 316; *S. v. Edwards, post,* 661. Upon investigation of all the exceptions we find

No error.

S. A. DUPREE v. L. P. HARRELL, LIQUIDATING AGENT OF THE BANK OF PENDER, AND GURNEY P. HOOD, COMMISSIONER OF BANKS FOR THE STATE OF NORTH CAROLINA.

(Filed 10 January, 1934.)

Banks and Banking H e—Under facts of this case plaintiff held not entitled to preference in assets of insolvent bank.

A depositor drew a check in the bank's favor for a part of his deposit and instructed an officer of the bank to buy Liberty Bonds with the proceeds. Several days later the bank sent a cashier's check for the amount with an order for the bonds to a broker. The bank closed its doors because of insolvency on the day the broker received the cashier's check, and the broker returned the check which was credited to the depositor's account by the liquidating agent. *Held,* the depositor was not entitled to a preference for the amount of his check to the bank.

CIVIL ACTION, before *Devin, J.,* 26 April, 1933. From PENDER.

The pertinent facts are substantially as follows: The plaintiff had on deposit with the Bank of Pender on 2 January, 1932, as a checking account, the sum of $3,156.75. On that date Dupree drew a check against said deposit in words and figures as follows: "Burgaw, N. C., 2 January, 1932. The Bank of Pender 66-321. Pay to the order of Bank of Pender $2,000 two thousand dollars, for $2,000 L. B., S. A. Dupree." Said S. A. Dupree caused said check to be presented to said bank on 2 January, 1932, during regular banking hours, and C. C. Branch, president of the bank, was instructed to purchase Liberty Bonds with the proceeds of said check. It was the custom of said bank to purchase bonds for its customers when requested to do so. The Bank of Pender held said check until 6 January, 1932, and on said date charged the same to the account of S. A. Dupree. After said check had been charged to his account Dupree then had a balance on deposit of $1,127.41. On 6 January, 1932, the Bank of Pender issued its cashier's check for the sum of $2,000, payable to F. E. Nolting and Company, and transmitted the check together with an order for $2,000 of Liberty Bonds, to be shipped to S. A. Dupree. The Bank of Pender did not open for business on 7 January, 1932, and has since been in the hands of the State Commissioner of Banks. Nolting and Company received the check and order for bonds on 7 January, 1932, and after learning that the Bank of Pender had failed, returned the check and canceled the order. When the cashier's check reached the Bank of Pender authorities employed by the State Commissioner of Banks, were making an audit of the condition of the bank and the auditors credited said cashier's check to the account of S. A. Dupree after said bank had been closed and its business suspended.

At the time the bank suspended business it had on hand in its vaults and on deposit the sum of $16,245.35, and at all times from 2 January, 1932, to 7 January, 1932, inclusive, had on hand in cash in excess of the amount necessary for the purchase of the bonds.

Upon the foregoing facts the trial judge found as a matter of law that the sum of $2,000 sued on in this action was a special deposit for a specific purpose in the Bank of Pender at the time of the closing of said bank on 6 January, 1932, and said sum was further declared to be a lien upon the assets of the bank, and the Commissioner of Banks ordered to pay said sum in full before making payment to unsecured creditors.

From judgment so signed the defendant appealed.

Clifton L. Moore for plaintiff.
R. G. Johnson for defendant.

BROGDEN, J. The only question of law is whether the facts create a preference.

The plaintiff insists that the facts disclose that he had on checking account $3,156.75, and that he was anxious to purchase $2,000 worth of Liberty Bonds with this money. Thereupon he went to the bank and drew a check on his account, payable to the bank, for the sum of $2,000, and presented the check to an official of the bank, who agreed to use the proceeds of same, to wit, the sum of $2,000, for the sole and exclusive purpose of purchasing Liberty Bonds. Therefore, the plaintiff says that in legal effect he presented his check at the window, received $2,000 in cash, and redeposited the money in the bank as a special deposit for the sole purpose of buying Liberty Bonds, and hence he is entitled to a preference. The identical contention was made in *Blakey v. Brinson*, 286 U. S., 254, 76 L. Ed., 1089, and it was intimated that such position found support in the authorities and "might afford a basis for the inference that respondent no longer content with the rôle of creditor, had sought to establish a trust fund."

Upon the other hand the defendant insists that the plaintiff had $3,156.75 in the bank and was desirous of using a portion of said fund for the purpose of purchasing Liberty Bonds; that while he drew a check payable to the bank and presented it to another official of the bank that this transaction was in effect a mere shifting of credit in the bank affecting the identical sum of money then to the credit of the plaintiff, and that no act was done which separated the $2,000 from the mass of the deposit, and that in truth the giving of the check, under the circumstances, disclosed by the record was merely an incident of using funds in the bank to buy Liberty Bonds, and that no new money whatever went into the bank to swell its assets.

Although there is wide divergence among the textwriters and courts of last resort in interpreting the law of preference, the view taken by the defendant is in accord with the former pronouncement of the court upon the subject. *Parker v. Trust Co.,* 202 N. C., 230, 162 S. E., 564; *Williams v. Hood,* 204 N. C., 140; *In re Bank of Pender,* 204 N. C., 143; *Flack v. Hood,* 204 N. C., 337; 82 A. L. R., 46, *et seq.* The plaintiff is entitled to judgment but not to a preference.

Modified and affirmed.

E. McL. WILSON ET AL. v. O. O. ALLSBROOK ET AL.

(Filed 10 January, 1934.)

Reference C d—Held: appellant was not prejudiced by affirmance of supplemental report, and judgment of affirmance is upheld.

The findings of fact by the referee, supported by evidence and approved by the trial court are conclusive on appeal unless some error of law has been committed in the hearing, and where an order remanding the case to the referee for additional facts has been entered, and on appeal therefrom the order is affirmed, a hearing by the referee after notice without further order from the court, and his finding of such additional facts will not support an appeal, it appearing that no prejudice has resulted to appellants by failure of the trial court to order the case remanded after affirmance of the appeal if such order was necessary, the additional findings being supported by evidence and being approved by the trial court, but if such order is necessary it could be entered *nunc pro tunc.*

APPEAL by plaintiffs from *Sinclair, J.,* at May Term, 1933, of NEW HANOVER.

Civil action to restrain threatened foreclosure under third deed of trust, and for an accounting.

I. C. Wright for plaintiffs.
Charles B. Newcomb and John A. Stevens for defendants.

STACY, C. J. At the February Term, 1932, New Hanover Superior Court, there was a consent reference in this cause. At the June Term, 1932, judgment confirming the report of the referee was entered, from which the plaintiffs appealed. The cause was remanded for an additional finding of fact. 203 N. C., 498, 166 S. E., 313.

At the February Term, 1933, over objection of plaintiffs, the matter was remanded to the referee for the additional fact to be found, in accordance with the opinion of the Supreme Court. The plaintiffs again appealed. 204 N. C., 479, 168 S. E., 676.

Pending this second appeal, the referee, on 2 March, 1933, filed his supplemental report ostensibly upon the evidence already taken and without any additional hearing or notice to the parties. This was irregular. *Griffin v. Bank, ante,* 253; *Bohannon v. Trust Co.,* 198 N. C., 702, 153 S. E., 263; *Pruett v. Power Co.,* 167 N. C., 598, 83 S. E., 830.

Recognizing the inappropriateness of this procedure, the referee, following the judgment of affirmance on appeal, opinion filed 5 April, 1933, 204 N. C., 479, 168 S. E., 676, gave notice of hearing, took additional evidence, made his additional finding of fact and reported the same to the court in a supplemental report filed 17 May, 1933. Exceptions were duly filed to this report, which were overruled, and the same confirmed in all respects at the May Term, 1933. Plaintiffs again appeal.

The supplemental report is supported by ample evidence, and the same has been approved by the judge of the Superior Court. This would seem to end the matter. *Kenney v. Hotel Co.,* 194 N. C., 44, 138 S. E., 349.

It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if supported by any competent evidence, unless some error of law has been committed in the hearing of the cause. *Corbett v. R. R., ante,* 85; *Wallace v. Benner,* 200 N. C., 124, 156 S. E., 795; *Crown Co. v. Jones,* 196 N. C., 208, 145 S. E., 5; *Robinson v. Johnson,* 174 N. C., 232, 93 S. E., 743; *Thompson v. Smith,* 156 N. C., 345, 72 S. E., 379 (opinion by *Walker, J.,* pointing out the difference between the duties of the trial court and the appellate court in dealing with exceptions to reports of referees); *Dorsey v. Mining Co.,* 177 N. C., 60, 97 S. E., 746.

But it is the position of the plaintiffs that the referee was without authority to proceed in the cause in the absence of an order remanding the case to him following the judgment of affirmance rendered 5 April, 1933. Conceding, without deciding, that the plaintiffs' position in this respect may be well taken, we fail to see wherein the plaintiffs have been prejudiced by the course pursued in the court below. The matter had already been remanded to the referee, and this was affirmed on appeal. 204 N. C., 479, 168 S. E., 676. But if need be, an order *nunc pro tunc* would cure any defect. *Powell v. Fertilizer Works, ante,* 311. The plaintiffs were given a hearing by the referee, additional testimony was taken, and the supplemental report has been reviewed on exceptions by the judge. This same procedure would be followed again, if the judgment were vacated.

Affirmed.

TOM PEMBERTON ET AL. v. CITY OF GREENSBORO.

(Filed 10 January, 1934.)

1. **Pleadings I a—Motion to require separate allegation of causes is properly refused where complaint alleges one cause and elements of damages.**

   Several elements of damages may be alleged on one cause of action, and where this has been done, defendant's motion to require plaintiff to file an amended complaint, based on the theory that each element of damage constituted a separate cause of action and should be separately alleged, is properly refused. C. S., 506.

2. **Appeal and Error L d—**

   Where a motion to strike out a paragraph is allowed in part and the correctness of the ruling refusing the motion as to whole paragraph is determined by appeal, a subsequent appeal presenting the same question will be affirmed.

3. **Appeal and Error J e—Where no harm results to defendant from refusal of his motion to strike out, the judgment will be affirmed.**

   The refusal of a motion to strike out certain portions of a bill of particulars as irrelevant and immaterial, C. S., 537, will be affirmed where it appears that defendant was not prejudiced thereby, the matter lending itself to an easier determination by correct rulings on the admissibility of evidence offered in support of such allegations. As to whether the refusal of the motion is appealable, C. S., 534, *quære?*

APPEAL by defendant from *Sink, J.,* at October Term, 1933, of GUILFORD.

Civil action to recover compensation for the partial taking of plaintiffs' lands, or damages for an alleged nuisance arising out of the construction and maintenance of a sewage disposal plant.

The complaint alleges several elements of damage, a number of which the defendant asked to have stricken out as irrelevant and immaterial. C. S., 537. The motion was allowed in part and the plaintiffs required to file a bill of particulars. From this ruling, the defendant appealed because the court "refused to strike from the complaint the irrelevant or redundant matter set forth therein." The ruling was not disturbed on appeal. 203 N. C., 514, 166 S. E., 396.

Thereafter, the plaintiffs filed their bill of particulars, and the defendant again lodged its motion to require the plaintiffs:

First, to file an amended complaint and allege separately each separate cause of action relied upon;

Second, to strike out paragraph 3 of the complaint;

Third, to strike out certain portions of the bill of particulars.

Motion denied, and the defendant again appeals.

Smith, Wharton & Hudgins and Frazier & Frazier for plaintiffs.
Andrew Joyner, Jr., and Sapp & Sapp for defendant.

STACY, C. J. It is not perceived that any harm has come to the defendant from the court's ruling, or that any injury is likely to result therefrom. Doubtless the plaintiffs made their specifications as broad as they could, because they were aware that, in filing a bill of particulars, they would be restricted in their proof "to the items therein set down." *Gruber v. Ewbanks,* 199 N. C., 335, 154 S. E., 318; *Ham v. Norwood,* 196 N. C., 762, 147 S. E., 291; *Gore v. Wilmington,* 194 N. C., 450, 140 S. E., 71; *S. v. Wadford,* 194 N. C., 336, 139 S. E., 608; *S. v. Lea,* 203 N. C., 13, 164 S. E., 737.

But considering the several grounds of the motion in the order named:

First: As we understand it, but a single cause of action is set out in the complaint, hence the first prayer of the motion was properly denied. It is true, several elements of damages are alleged, but this does not constitute as many separate and distinct causes of action. C. S., 506; Rule 20, sec. 2, Rules of Practice, 200 N. C., 826.

Second: The motion to strike out paragraph 3 of the complaint was allowed in part and presented on the first appeal. 203 N. C., 514, 166 S. E., 396.

Third: In so far as the order deals with the bill of particulars, it may be doubted whether it is appealable. C. S., 534; *Temple v. Western Union, ante,* 441; *Townsend v. Williams,* 117 N. C., 330, 23 S. E., 461. Compare *Ellis v. Ellis,* 198 N. C., 767, 153 S. E., 449.

The court below was of opinion that the matters and specifications, now assailed, could better be determined by rulings upon the competency of the evidence, if and when offered, than by undertaking to chart the course of the trial by passing upon undenied allegations. *S. v. Lumber Co.,* 199 N. C., 199, 154 S. E., 72. In this, we see no error. There may be no evidence offered on some of the items, which would *ipso facto* eliminate them. Then, why debate them in advance of the necessity of doing so?

It is not to be inferred, however, from the failure of the court presently to strike out some of the specifications in the bill of particulars, that they are regarded as competent to be shown in their entirety on the hearing. The competency of the evidence will be determined when offered. The proper measure of damages in such cases has been the subject of a number of decisions, and these may be called to the attention of the court on the trial if desirable.

Affirmed.

STATE v. DEXTER WELBORN ET AL.

(Filed 10 January, 1934.)

Bail B e—Absolute judgment on forfeited recognizance under facts of this case held error.

Where defendant and the sureties on his appearance bond appear in answer to a *scire facias* and show that defendant's failure to appear at a prior term of court in accordance with the terms of the bond was due to the fact that defendant had been turned over to the Federal Court by a prior bondsman and that defendant was then serving a sentence imposed by that court, it is error for the court to enter absolute judgment on the bond, C. S., 791, the cases against defendant as well as the hearing on the *scire facias* being subject to continuance.

APPEAL by respondents from *Stack, J.*, at June Term, 1933, of GUILFORD.

Proceeding on appearance bond.

The defendant, Dexter Welborn, was under bond, in the penal sum of $1,850, with D. Alice Welborn and R. W. Welborn as sureties thereon, for his appearance at the April Term, 1933, Guilford Superior Court, to answer a number of criminal charges.

Upon failure of the defendant to appear at said term, "judgment *nisi sci. fa.* and capias returnable to the June Term" was duly entered.

In answer to the *scire facias*, the defendant and his sureties showed to the court that the defendant's failure to appear at the April Term, as required by his recognizance, was due to the fact that he had been surrendered by other bondsmen on a prior bond to the United States marshal at Winston-Salem, N. C., when and where he was tried, convicted and sentenced to the United States Industrial Reformatory for a period of thirty-three months, which sentence he was then serving.

The court being of opinion that the facts set out in the answer to the *sci. fa.* were insufficient to discharge the writ, entered judgment absolute for the penalty of the bond, to be discharged, however, upon the payment of $400, within sixty days, said sum to be used (1) to pay the costs of the seven cases pending against the defendant, and (2) the balance, if any, to be paid into the school fund.

From this judgment, the defendant and his sureties appeal.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

Cox & Prevette for defendants.

STACY, C. J. It is conceded by the Attorney-General that the judgment entered on the forfeited recognizance cannot be sustained. C. S., 791.

The action of the Federal Court and the defendant's present confinement in prison prevented him from appearing, and his bondsmen from producing him, at the April Term, Guilford Superior Court, agreeably to the provisions of his recognizance. *Granberry v. Pool,* 14 N. C., 155; 6 C. J., 1026; 3 R. C. L., 52; Annotation, 26 A. L. R., 412. Hence, under the principles announced in *S. v. Eure,* 172 N. C., 874, 89 S. E., 788, *S. v. Holt,* 145 N. C., 450, 59 S. E., 64, and *S. v. Morgan,* 136 N. C., 593, 48 S. E., 604, the cases, as well as the hearing on the *scire facias,* might well have been continued until this legal impediment is removed. *Adrian v. Scanlin,* 77 N. C., 317; *Sedberry v. Carver,* 77 N. C., 319.

It is not clear as to what "costs" have accrued in the seven cases against the defendant for which he may be adjudged liable or the proceeds from his forfeited recognizance used to pay, C. S., 5628, *S. v. Maultsby,* 139 N. C., 583, 51 S. E., 956, but as there was error in entering judgment absolute on the bond, this point may not arise in subsequent proceedings.

Error and remanded.

STATE v. NEAL SINODIS.

(Filed 10 January, 1934.)

Perjury B c—Evidence held insufficient to be submitted to jury in this prosecution for perjury.

In a prosecution for perjury, conflict in the testimony of defendant and the prosecuting witness which is subject to explanation, with no direct testimony that defendant swore falsely at the time alleged in the bill of indictment, is insufficient to be submitted to the jury.

APPEAL by defendant from *Shaw, Emergency Judge,* at June Special Term, 1933, of GUILFORD.

Criminal prosecution tried upon indictment in which it is charged that on 4 January, 1933, the defendant did wilfully and feloniously commit perjury upon the trial of an action before A. H. Trotter, justice of the peace, wherein Sam Vail, trading as Davis Electric Company, was plaintiff, and Neal Sinodis was defendant, by falsely asserting on oath (1) that he had made no contract for electrical installations in the La Belle Soda Shop, (2) that he did not know the said Sam Vail, and (3) that he had no connection with and did not own the La Belle Soda Shop, knowing that said statements were material to the issue and false.

The civil action before the justice of the peace was to recover $25.00 for electrical work done in the La Belle Soda Shop. The defendant testified before the justice of the peace, and repeated his testimony on the present trial, that he made no contract with Sam Vail for installing electrical equipment in the La Belle Soda Shop; that he did not know Sam Vail at that time; and that he did not own the La Belle Soda Shop—the only interest he had in it was, that he wanted his brother-in-law, who operated it with another, "to do good," or to make a success of the enterprise.

Demurrer to the evidence overruled; exception.

Verdict: Guilty.

Prayer for judgment continued from June to July Term, "upon payment of $25.00 to the use of Sam Vail and payment of costs." Costs, $165.00 (including $25.00 to Sam Vail), paid at June Term.

Judgment at July Term: Imprisonment in the State's prison for a period of six months to be assigned to work under the State Highway Public Works Commission as provided by law.

The defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

Gold, McAnally & Gold for defendant.

STACY, C. J. The evidence appearing on the record is not sufficient to carry the case to the jury on the issue of perjury. *S. v. Hawkins,* 115 N. C., 712, 20 S. E., 623. It is true, the testimony of Sam Vail may inferentially be in conflict with that of the defendant, but he does not say the defendant testified falsely before the justice of the peace. This is not enough on an indictment for perjury. *S. v. Gates,* 107 N. C., 832, 12 S. E., 319; *S. v. Peters,* 107 N. C., 876, 12 S. E., 74; 21 R. C. L., 259.

After losing his case before the justice of the peace and without appealing, Vail testifies: "I indicted him (the defendant) before one magistrate and the magistrate dismissed the case. Then I indicted him before a second magistrate for perjury, as my lawyer told me to do it, and it was dismissed, and then I went down to the city hall to get a warrant."

When it is considered that the defendant expresses himself stumblingly in English, and that the plaintiff in the civil action was doing business under a trade name which did not disclose his identity, the testimony of the defendant seems readily explainable.

Reversed.

JESSE TEASLEY v. CLARA D. TEASLEY.

(Filed 10 January, 1934.)

Appeal and Error J e—Where party is not prejudiced by refusal of his motion to strike out, judgment will be affirmed.

Where defendant denies an allegation in plaintiff's complaint and avers matters in elaboration of such denial, the refusal of plaintiff's motion to strike out such further averment on the ground that it was not made in good faith, but to delay trial by contesting the case, the docket being congested, will not be disturbed on appeal, since the case would remain on the docket as a contested case even if the motion were granted, and it appearing that no harm resulted to plaintiff from the refusal of the motion. As the matter alleged in elaboration of the denial would be competent in evidence merely upon the allegation and denial, whether the ruling affected a substantial right and was appealable, *quære?*

APPEAL by plaintiff from *Harding, J.,* at October Term, 1933, of MECKLENBURG.

Civil action for divorce *a vinculo* on the ground that "there has been a separation of husband and wife, and plaintiff and defendant have lived separate and apart for two years."

Answering, the defendant denies that the parties have lived separate and apart, within the meaning of chapter 163, Public Laws, 1933, for two years; and further avers "the truth concerning the separation" is, that plaintiff and defendant are living apart by agreement and under order of court that plaintiff shall support the defendant.

Motion by plaintiff to strike out the further allegation of the answer, pleaded in bar of plaintiff's right to a divorce, for that the same is not made in good faith but to delay a trial of the cause, the civil issue docket in Mecklenburg County being so congested that contested cases cannot be heard for a year or more.

Affidavits of crimination and recrimination were filed on both sides.

The only judgment appearing on the record is the following:

"The court overruled the motion."

Plaintiff appeals, assigning error.

Thomas W. Alexander for plaintiff.
No counsel appearing for defendant.

STACY, C. J. As we understand the record, the further averment of the answer, which the plaintiff seeks to have stricken out, is but an elaboration of the denial, previously made, of the allegation that the parties have lived separate and apart for two years within the meaning of chapter 163, Public Laws, 1933.

If the motion were allowed, the case would still remain on the docket as a contested case; and, in view of the affidavits relative to "the truth concerning the separation," we are not disposed to try to chart the course of the trial in advance of the hearing upon its merits. *Pemberton v. Greensboro, ante,* 599. It is not perceived that any harm has come to the plaintiff from the court's action, or that any injury is likely to result therefrom. The ruling will not be disturbed on the record as presented.

Indeed, it may be doubted whether the ruling affects such a substantial right as to make it appealable. *Billings v. Observer,* 150 N. C., 540, 64 S. E., 435; *Rogerson v. Lumber Co.,* 136 N. C., 266, 48 S. E., 647; *Lutz v. Cline,* 89 N. C., 186. The evidence as to the true nature of the separation would be competent with or without the explanatory allegation.

The case is not like *Deloatch v. Vinson,* 108 N. C., 147, 12 S. E., 895, cited and relied upon by plaintiff, or *Ellis v. Ellis,* 198 N. C., 767, 153 S. E., 449.

Affirmed.

BEESON HARDWARE COMPANY AND GENERAL MOTORS ACCEPTANCE CORPORATION v. O. B. MALPASS AND J. C. MALPASS.

(Filed 10 January, 1934.)

1. **Sales I d—Nothing else appearing, seller is entitled to possession in accordance with terms of contract upon bankruptcy of purchaser.**

The provision in a conditional sales contract that if proceedings in bankruptcy were instituted against the purchaser all deferred payments should become due and the seller or his assignee entitled to immediate possession for the purpose of selling the property, entitles the seller or his assignee to immediate possession upon the happening of the condition notwithstanding that none of the deferred payments was due according to the schedule of payment.

2. **Appeal and Error E h—**

On appeal from a nonsuit entered on plaintiff's evidence prior to the introduction of evidence by defendant, the legal effect of the defenses set up in defendant's answer is not presented for review.

APPEAL by plaintiffs from *Sink, J.,* at September Term, 1933, of GUILFORD. Reversed.

This action was begun and tried in the municipal court of High Point.

At the close of the evidence for the plaintiffs the defendants moved for judgment dismissing the action as of nonsuit. The motion was allowed, and the plaintiffs excepted.

From judgment dismissing the action, the plaintiffs appealed to the Superior Court of Guilford County. At the hearing of this appeal, the judgment was affirmed, and the plaintiffs appealed to the Supreme Court.

D. H. Parsons for plaintiffs.
M. W. Nash for defendants.

CONNOR, J. This is an action to recover possession of certain articles of personal property sold and delivered to the defendant, O. B. Malpass, under and pursuant to the terms and conditions of certain conditional sales agreements, which are in writing, and which are duly recorded in Guilford County. These articles of personal property are now in the possession of the defendant, J. C. Malpass, a son of O. B. Malpass. Prior to the date of the commencement of the action the conditional sales agreements were sold, transferred and assigned by the plaintiff, Beeson Hardware Company, to the plaintiff, General Motors Acceptance Corporation. At said date they were owned by the said General Motors Acceptance Corporation, but are now owned by the Beeson Hardware Company.

It is provided in each of the conditional sales agreements that in the event a proceeding in bankruptcy shall be instituted against the vendee, all the deferred payments on the purchase price of the property described therein shall become due and payable, and that the vendor shall be entitled to the immediate possession of said property for the purpose of selling the same to the end that the proceeds of the sale may be applied to the payment of the balance due on the purchase price of said property.

Prior to the commencement of the action, the defendant, O. B. Malpass, was adjudged a bankrupt by the United States District Court for the Middle District of North Carolina. For this reason the plaintiffs are entitled to the possession of the property described in each of said conditional sales agreements and there was error in the judgment dismissing the action as of nonsuit. The judgment of the Superior Court is reversed.

No evidence was offered at the trial in the municipal court by the defendants. For this reason the defenses set up in their answer cannot now be considered. If these defenses are established by evidence at another trial, the plaintiffs will not be entitled to recover in this action; otherwise, by reason of the provision in the conditional sales agreement, the plaintiffs are entitled to the possession of the property described therein, notwithstanding the fact that none of the deferred payments on the purchase price of said property were due under the terms of said agreements, at the date of the commencement of the action.

The judgment of the Superior Court affirming the judgment dismissing the action, is

Reversed.

STATE v. GEORGE KEATON.

(Filed 10 January, 1934.)

Criminal Law G i—Nonexpert witness may testify from observation as to sanity of defendant.

Where in a criminal prosecution the defendant sets up the defense of insanity, the exclusion of testimony of a nonexpert witness, based upon observation of defendant, that defendant was insane at the time of the commission of the crime, is reversible error.

APPEAL by prisoner from *Sink, J.,* at February Term, 1933, of FORSYTH.

Criminal prosecution tried upon indictment charging the prisoner with the murder of one Annie Thigpen.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

William Graves and Manly, Hendren & Womble for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on 19 January, 1933, the prisoner, George Keaton, shot and killed Annie Lee Thigpen under circumstances indicative of a mind fatally bent on mischief and a heart devoid of social duties. The deceased, a girl eighteen years of age, to whom the prisoner was evidently paying court, was on her way home from school when the prisoner, without apparent cause or provocation, shot her three times because "she had made his life miserable," he said, and as she pleaded: "Please don't shoot me."

The homicide is not denied. The defense interposed on behalf of the prisoner was that of insanity resulting from syphilis in the third or tertiary stage, which "affects every organ in the body, including the brain," according to one of the physicians. It is further in evidence that syphilis is a common cause of insanity.

The prisoner offered Clarence Gilliam as a witness, who testified that he had known the accused for practically two years, having roomed with him, and that he had an opinion, based upon his knowledge and observation of the prisoner, as to whether he was sane or insane on the day of the homicide. Upon objection, the witness was not allowed to state his opinion, which is "that the prisoner was insane." Exception.

We think this proffered testimony was competent, and its exclusion hurtful. *S. v. Jones,* 203 N. C., 374, 166 S. E., 163. Any witness who has had opportunity of knowing and observing the character of a person, whose sanity or mental capacity is assailed or brought in question, may not only depose to the facts he knows, but may also give in evidence his opinion or belief as to the sanity or insanity of the person under review, founded upon such knowledge and observation, and it is for the jurors to ascribe to his testimony that weight and credibility which the intelligence of the witness, his means of knowledge and observation, and all the circumstances attending his testimony, may in their judgment deserve. *Clary v. Clary,* 24 N. C., 78.

Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders. *White v. Hines,* 182 N. C., 275, 109 S. E., 31. "One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." *Whitaker v. Hamilton,* 126 N. C., 465, 35 S. E., 815.

Upon the record, the prisoner is entitled to a new trial. It is so ordered.

New trial.

STATE v. CLYDE FOWLER AND FRED BRINCEFIELD.

(Filed 10 January, 1934.)

Gambling B d—Statute raising presumption of guilt of operating a lottery from possession of tickets, etc., held constitutional.

Chapter 434, Public Laws of 1933, amending C. S., 4428, which makes the possession of tickets, etc., used in the operation of a lottery prima facie evidence of violation of the section, is constitutional and valid, the presumption being a rational one, and *held further,* under the presumption, the evidence of guilt of one of the defendants was sufficient to be submitted to the jury, but as to the other the evidence was insufficient, and as to him the demurrer to the evidence is sustained.

APPEAL by defendants from *Sink, J.*, at May Term, 1933, of FORSYTH.

Criminal prosecution tried upon an indictment charging the defendants with dealing in a lottery in violation of C. S., 4428, as amended by chapter 434, Public Laws, 1933.

On the morning of 25 May, 1933, about the hour of 9:30 a.m. a number of deputy sheriffs of Forsyth County, armed with a search warrant, entered a house just outside the city limits of Winston-Salem and found the defendants, together with their wives, in the front room. There was no one else in the house except one or two small children. The defendant Fowler said the house was rented by him and that he had been living there a month or six weeks. The defendant Brincefield said he lived on Fourth Street in Winston-Salem, and that he had only been there a short time, about fifteen minutes.

In searching the premises, to which no objection was interposed, the officers found in a closet and an outhouse, or chicken house, certain tickets, paraphernalia and material used in the operation of a lottery.

The defendants demurred to the State's evidence and rested.

Verdict: Guilty as to each of the defendants.

Judgment: Six months on the roads as to each of the defendants.

The defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

John D. Slawter and Sanford W. Brown for defendants.

STACY, C. J. The evidence is sufficient to carry the case to the jury as against the defendant Fowler. Hence, the verdict and judgment will be upheld as to him.

But with respect to the defendant Brincefield, the evidence does no more than raise a suspicion, somewhat strong perhaps, of his guilt. Therefore, the demurrer to the evidence will be sustained as to him. *S. v. Carter,* 204 N. C., 304, 168 S. E., 204.

The defendants assail the constitutionality of chapter 434, Public Laws 1933, amending C. S., 4428, which makes the possession of tickets, certificates or orders used in the operation of a lottery prima facie evidence of a violation of said section, but the connection between the fact proved and the ultimate fact presumed seems to be a rational one, hence the objection must fail. *S. v. Russell,* 164 N. C., 482, 80 S. E., 66; *S. v. Wilkerson,* 164 N. C., 431, 79 S. E., 888; *S. v. Barrett,* 138 N. C., 630, 50 S. E., 506.

The case is not like *S. v. Griffin,* 154 N. C., 611, 70 S. E., 292, cited and relied upon by defendants.

Reversed as to defendant Brincefield.

No error as to defendant Fowler.

STATE v. JAMES JOHNSON.

(Filed 10 January, 1934.)

Criminal Law L a—

Where the defendant, convicted of a capital felony, fails to prosecute his appeal in accordance with the Rules of Court, the appeal will be dismissed on motion of the Attorney-General, no error appearing upon the face of the record.

MOTION by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

STACY, C. J. At the April Criminal Term, 1933, Hoke Superior Court, the appellant herein, James Johnson, was tried upon an indictment charging him with the murder of one Virginia Leach, which resulted in a conviction and sentence of death. From the judgment thus entered, the prisoner gave notice of appeal to the Supreme Court, and was allowed thirty days within which to make out and serve statement of case on appeal, and the solicitor was given thirty days thereafter to prepare and file exceptions or countercase, but nothing has been done towards perfecting the appeal.

The prisoner having failed to prosecute his appeal, or to comply with the rules governing such procedure, the motion of the Attorney-General to docket and dismiss must be allowed. *S. v. Rector,* 203 N. C., 9, 164 S. E., 339.

No error appears on the face of the record, as certified in response to *certiorari. S. v. Edney,* 202 N. C., 706, 164 S. E., 23.

Appeal dismissed.

EDITH CHRISTIAN WOODY, T. B. CHRISTIAN, AND J. A. CHRISTIAN v. EMMA LOIS CHRISTIAN, EUNICE M. WYNNE AND HUSBAND, J. C. WYNNE; RUTH MANNING ALEXANDER AND HUSBAND, E. S. ALEXANDER; THOMAS CHRISTIAN, WILLIAM CHRISTIAN, SHEFFIELD CHRISTIAN, EDITH WOODY, MINOR, AND THE FIDELITY BANK, TRUSTEE OF THE W. J. CHRISTIAN, SR., DECEASED, ESTATE.

(Filed 10 January, 1934.)

1. **Wills E h—Held: under terms of will trustee could not be authorized to use corpus of estate to supplement payment to beneficiaries.**

Under the terms of the will in this case the remainder of testator's property was left in trust and the executor and trustee was directed to collect the rents and profits from the estate and pay the same, after deducting taxes, cost of repairs, etc., to certain beneficiaries each month. Upon the later shrinkage in value of the estate and a great decrease in the net income therefrom, certain of the beneficiaries instituted action to have the trustee authorized to use part of the *corpus* of the estate to supplement the monthly payments to the beneficiaries on the ground that they were the primary objects of the testator's bounty and that the reduced income was insufficient for their support and that they had no other means of supporting themselves. *Held,* the rule that the courts will construe a will with special regard for the primary objects of the testator's bounty is limited by the unequivocal terms of the will, and the court may not authorize the trustee to use part of the *corpus* of the estate to temporarily supplement the monthly income of the beneficiaries.

2. **Same—Held: trustee could be authorized to use corpus of estate to make extensive repairs necessary to preservation of estate.**

Where the executor and trustee under a will is directed to collect the rents and profits from the estate and from the proceeds to first pay taxes, cost of repairs, and all necessary expenses, etc., and then pay the remainder of the income monthly to certain beneficiaries, upon the shrinkage of the estate and the income therefrom the court may order and direct the trustee to use part of the *corpus* of the estate to make extensive repairs necessary to the preservation of the real estate and provide rental income therefrom, and the cost of such extensive repairs need not be paid out of the net income to the detriment of the beneficiaries.

3. **Wills E d—Held: under terms of trust estate daughter of deceased devisee had only contingent interest in the estate.**

Where the testator devises certain property to his daughters in fee and crates a trust estate in the remainder of his property for twenty years and directs that the rents and profits therefrom be collected by his executor and trustee and the net income therefrom be paid to his four sons, and "if either of them shall die before the expiration of twenty years leaving child or children, then such child or children shall receive their father's share of said net income," with provision for the division of the estate among the testator's heirs living at the expiration of the trust estate: *Held,* upon the death of one of the sons, his daughter him surviving is entitled to her father's share in the net income and a contingent interest in the *corpus* of the estate, but has no vested interest therein.

BROGDEN, J., not sitting.

APPEAL by plaintiffs from *Devin, J.,* June Term, 1933, of DURHAM. Modified and affirmed.

The court below found the following facts:

"This matter coming on for hearing upon a motion by attorneys for the petitioners for an allowance for support out of the principal of the estate; for costs of improvements, made to preserve the real estate and enhance the income, to be paid out of the principal of the estate; and that the estate of Edith Christian Woody be declared vested and free from contingencies; and being heard, and the pleadings being treated as affidavits for the purpose of the motion, and other evidence, oral and written, being offered, the court finds the following facts:

"1. That W. J. Christian, Sr., late of Durham County, died on 2 May, 1920, and that a copy of his last will and testament, duly probated in May, 1920, is attached hereto, marked Exhibit A.

"2. That the relation of the parties in this action to the deceased testator is as follows:

"T. B. Christian and J. A. Christian are sons of W. J. Christian, Sr., deceased; Edith Christian Woody is the granddaughter of W. J. Christian, Sr., deceased, being the only child of Charles E. Christian, deceased, son of W. J. Christian, Sr., deceased. Emma Lois Christian and Eunice M. Wynne are the daughters of W. J. Christian, Sr., deceased, and J. C. Wynne is the husband of Eunice M. Wynne; that Ruth Manning Alexander, Thomas Christian, William Christian, and Sheffield Christian are grandchildren, and Edith Woody a great-grandchild of W. J. Christian, Sr., deceased; that E. S. Alexander is the husband of Ruth Manning Alexander.

"3. That under Item 5 of the last will of W. J. Christian, Sr., deceased, all the rest and residue of his estate (after the making of certain devises in said will) was given in trust to the First National Trust Company of Durham to collect the rents from the real estate, dividends from the stocks and bonds, interest on the notes, and after paying the taxes, etc., the trustees were directed to pay 'the net income remaining, *once a month*,' equally to the four sons of W. J. Christian, Sr., to wit, Charles E., John A., Thomas B., and William J. Christian, Jr.

"That a 20-year period was named for the duration of the trust estate, subject to certain provisions, however, which might terminate the trust sooner. That the will provided that if any of the four sons should die within that period, his child or children should receive his father's share of said net income, and if no child or children, then the grandchild or grandchildren of that son who died. And if any of the sons should die during the trust period without leaving a child, or lawful issue of such child or children, the part of such deceased son should be divided equally, share and share alike, among his brothers and sisters, and to the children of such of them as may be dead, the share that should go to the daughters of W. J. Christian, Sr., to be in fee.

"4. That upon the death (1920) of W. J. Christian, Sr., he left as the 'rest and residue of his estate, real estate whose value was inventoried at $105,900.00; cash amount to $5,695.90; stock inventoried at $42,365.00, and Liberty Bonds amounting to $8,749.00'—or a total inventoried at $162,709.90. That after the debts, inheritance taxes and costs of administration of the estate were paid, as directed by the will, there remained as the net balance of the 'residue' of the estate, to make up the trust fund, the sum inventoried to be $154,951.85.

"5. That the First National Trust Company acted as trustee from the date of its appointment until 29 June, 1926; that from 29 June, 1926, until 17 January, 1932, the First National Bank of Durham acted as trustee; and since .... August, 1932, the Fidelity Bank of Durham has been the trustee.

"6. That from May, 1920, when the First National Trust Company qualified as trustee, until 17 January, 1932, when the First National Bank of Durham relinquished its trusteeship, the estate had suffered a loss of 25 per cent of the estate, as many speculative stocks and bonds purchased by the trustees out of proceeds of the estate proved worthless, and other doubtful stocks owned by the testator were never sold and the funds reinvested.

"7. That the gross income of the estate from 1 May, 1920, to 1 May, 1921, the year after the death of W. J. Christian, Sr., deceased, amounted to $11,429.45, and remained approximately that amount yearly through January, 1932.

"That during the period of approximately a year and a half, to wit, from 17 January, 1932, to 23 June, 1933, the gross income of the estate amounted to only $4,572.59.

"8. That in the year 1921 the beneficiaries received from the trust estate $6,622.28, and yearly thereafter through 1930 they received approximately that much.

"That in the year from June, 1932, to June, 1933, the beneficiaries of the trust estate received only $600.00, or less than 1/10 of the amount received in 1921.

"9. That W. J. Christian, Jr., died in September, 1921, without leaving lineal heirs, and that, according to the terms of Item 5 of the will, his one-fourth interest in the trust estate was divided equally between his three brothers, Charles E., John A., and Thomas B. Christian, and his two sisters, Eunice M. Wynne and Emma Lois Christian.

"10. That Charles E. Christian died on 15 December, 1929, and left surviving as his only heir a daughter, Edith Christian Woody. That under the terms of Item 5 of the will of W. J. Christian, Sr., deceased, the said Edith Christian Woody succeeded to the rights of her deceased father in the trust estate, and became possessed of a 6/20th interest therein.

"11. That T. B. Christian, son of the deceased testator, received approximately $125 to $150 *monthly* during the first ten years after the death of his father, which amount, with his own individual earnings, was sufficient for him to live in comfort. That during the past seventeen months, however, the said T. B. Christian has received only $180.00 in all, or an average of less than $11.00 monthly, and even that amount has not been paid monthly, but in two or three payments.

"That T. B. Christian, son of the deceased testator, is now 61 years old and is unemployed, and is unable to find work because of his age and the world-wide depression. That the National Government has recently taken away his pension, leaving him practically helpless. That the said T. B. Christian is totally unable to support himself and his family.

"12. That J. A. Christian, petitioner, and son of the testator, W. J. Christian, Sr., deceased, is now 64 years of age, and is also sadly embarrassed by lack of income. That for the first ten years after his father's death he received approximately $125.00 to $150.00 monthly, which amount, with his own individual earnings, was sufficient for him to live in comfort. That for the past seventeen months he received in all only $180.00, or an average of less than $11.00 monthly, and that amount was not paid monthly, but in two or three payments.

"13. That the plaintiff Edith Christian Woody, daughter and only heir of Charles E. Christian, deceased, one of the four sons of W. J. Christian, Sr., deceased, named in Item 5 of his will as a beneficiary, has no income whatever other than from her own labor. That she had a temporary job in a shop in Richmond, Virginia, at $7.00 a week, out of which she has to support her mother and her baby daughter.

"14. That there is owing to the estate on notes secured by real estate mortgages $18,904.05, and interest, which amount has been loaned out by the various trustees, and which notes are already past due.

"15. That the present trustee purchased, in August, 1933, for the estate over $5,000.00 worth of North Carolina bonds for reinvestment of principal money paid in. That the trustee has recently made extensive repairs in certain real estate belonging to the estate, involving an expenditure of $1,200.00 for the purpose of putting it in condition to produce rental income; that this money was borrowed from the bank and is being repaid. The report of the trustee is hereto attached and made a part of these findings. The transactions of the trustee with respect to the estate are found to be as set forth in defendant's answer and account and affidavit.

"16. That the property constituting the trust estate now in the hands of the trustee consists of the following:

Real estate, as shown by the report of C. H. Dixon, receiver, of the First National Bank, trustee, dated 17 January, 1932, estimated to be worth	$ 98,250.00
Investments on hand, as shown by the annual report of the Fidelity Bank, trustee, made on 28 July, 1933, as follows:	
Bonds—whose estimated value is	15,200.00
Notes—whose value is	18,904.05

Investments on hand—stocks:

10 shares Austin-Heaton Co., pfd.—value unknown.
80 shares Durham Hosiery Mills—value unknown.
32 shares First National Bank, Durham—worthless.
35 shares Holt Granite Puritan Mills—worthless (?).
160 shares John O'Daniel Hos'y Mills—worthless.
50 shares New Hope Realty Co., pfd.—worthless.
50 shares New Hope Realty Co., com.—worthless.

Estimated value estate—total..$132,354.05

"Upon the foregoing findings of fact, the court concludes as a matter of law:

"First. That the court has no authority as a matter of law to make an order directing the trustee to make payments out of the principal for the temporary support of the beneficiaries.

"Second. The court finds that it does not have authority as a matter of law to direct the trustee to pay for the repairs to the property out of the principal of the estate, and thereby relieve the income from that charge to the end that the said income may be distributed among the beneficiaries.

"Third. The court finds as a matter of law that the interest of the petitioner, Edith Christian Woody, is a contingent interest in the estate, and if she is not living at the end of the twenty-year period, it would then go to her children, if any she had, and if no children or grandchildren, then to be distributed among the children of the deceased testator, W. J. Christian, Sr."

The plaintiffs, petitioners, except and assign error to the foregoing conclusions of law, and appeal to the Supreme Court. The necessary provision of the will of W. J. Christian, Sr., will be set forth in the opinion.

R. O. Everett and H. McD. Robinson for plaintiffs.
No counsel for defendants.

Clarkson, J. The questions involved: (1) Did the court have authority as a matter of law under the findings of fact in the case to direct the trustee: (a) To make payments out of the principal of the estate for the temporary support of the beneficiaries? We think not under the facts and circumstances of this case. (b) To pay for *extensive* repairs to certain of the property out of the income remaining? We think not under the facts and circumstances of this case. (2) Does the petitioner, Edith Christian Woody, have a contingent interest in the estate? We think under the will she has her father's share in the "net income remaining" and a contingent interest.

Item 5 of the will of W. J. Christian, Sr., in part, is as follows: "All the rest and residue of my estate, both real, personal and mixed, wherever and howsoever situate, I give, devise and bequeath to the First National Trust Company, Durham, N. C. To have and to hold the same to it and its successors upon the following uses, purposes and trusts, that is to say: (1) To collect the rents from my real estate, the dividends from my stocks and bonds and the interest on my notes and bonds, and *after paying the taxes, insurance, repairs, municipal assessments, and all necessary expenses, said trustee will pay the net income remaining, once a month, equally to my four sons,* Charles E. Christian, John A. Christian, Thomas R. Christian and William J. Christian, Jr., share and share alike for and during the term hereinafter specified. (2) If either of my sons shall die before the expiration of twenty (20 years) after my death, leaving a child or children, then such child or children shall receive their father's share of said net income; and if at the time of such son's death any of his children be dead leaving children, such children will receive the portion of net income which their parent would have received if alive at my son's death."

In *Carter v. Young,* 193 N. C., 678 (681-2), it is written: "Courts exercising equitable jurisdiction have been slow to interfere with a trustee who holds property in trust for another, and who is vested with discretion as to the manner in which his duties with respect to such property shall be performed. When it appears that a trustee has exercised, or proposes to exercise, such discretion in good faith, and with an honest purpose to effectuate the trust, the courts will not undertake to supervise or control his actions. They will not undertake to set aside or override his judgment in matters clearly committed to his discretion, and to substitute therefor the judgment of others, or their own judgment, upon the sole allegation that the action of the trustee is not wise or just. See *Troutt v. Pratt* (Va.), 56 S. E., 165, 8 L. R. A. (N. S.), 398, and case-notes. The courts, however, have not hesitated to assume jurisdiction and to grant relief to a *cestui que trust,* when it appears that the trustee has acted in bad faith, or with a fraudulent purpose, to the injury of the *cestui que trust.* See *Collister v. Fassett* (Ct. of App. N. Y.), 57 N. E., 490."

It is contended by plaintiffs, appellants, that from examining the will that the intent and primary purpose of the testator in providing the trust estate was to see that his four sons were comfortably provided for during their lives. This contention is true, but the clear language of the will of the testator limits and shackles the trustee.

Under the language of the will, we think the court below had no authority to make payments out of the principal of the estate for the temporary support of the beneficiaries. But part of finding of fact 15 is as follows: "That the trustee has recently made *extensive repairs* in certain real estate belonging to the estate, involving an expenditure of $1,200.00, for the purpose of putting it in condition to produce rental income; that this money was borrowed from the bank and is being repaid."

In *Carter v. Young, supra,* at p. 683, it is said: "No higher obligation rests upon the courts of this State than that which requires them to effectuate the purpose and intent of a testator, clearly expressed in his last will and testament, with respect to the maintenance and support of a dependent child, who was during the lifetime of the testator the object of his affection and solicitude. The courts have ample power to discharge this obligation."

To be sure, the will gives the trustee authority to make *repairs,* before paying the "net income remaining." The finding of fact is that the trustee made *extensive repairs.* We do not question the good faith of the trustee, but think that if it was necessary to make *extensive repairs* that under the facts and circumstances of this case the *corpus* could be used for this purpose and the "net income remaining" would include the rents paid out for extensive repairs, and should be divided as set forth in Item 5, *supra,* of the will.

In *Middleton v. Rigsbee,* 179 N. C., 437 (440), we find: "As appertaining to the facts of this record, the decided cases on the subject hold that courts in the exercise of general equitable jurisdiction may decree a sale of property for reinvestment, where it is shown that such a course is required for the preservation of the estate and the protection of its owners. And the position may in proper instances be extended to a sale of a portion of the property for the protection and preservation of the remainder. The principle adverted to has been not infrequently applied in the proper administration of charitable and other trusts, and the exercise of the power has been justified and upheld, notwithstanding limitations in the lease or deed creating the estate which apparently imposed restrictions on the powers of the trustees in this respect when it is properly established that a sale is required by the necessities of the case, and the successful carrying out of the dominant purposes of the trust. *Trust Co. v. Nicholson,* 162 N. C., 257; *Grace Church v. Ange,* 161 N. C., 315; *Jones v. Haversham,* 107 U. S., 175; *Stanly v. Colt,* 72 U. S., 119-169; *Weld v. Weld,* 23 Rd. Island, 311."

In *Shannonhouse v. Wolfe,* 191 N. C., 769 (773), it is said: "Sales may be made: . . . (4) If the power of sale is prohibited in the trust instrument, but, if at the same time a sale of the trust property is indispensable to the preservation of the interests of the parties in the subject-matter of the trust. 'We think it is well settled that a court of equity, if it has jurisdiction in a given cause, cannot be deemed lacking in power to order the sale of real estate which is the subject of a trust, on the grounds, alone, that the limitations of the instrument creating the trust expressly deny the power of alienation. It is true, the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity of the most urgent character.' *Trust Co. v. Nicholson,* 162 N. C., 257; *St. James v. Bagley,* 138 N. C., 384; *Church v. Bragaw,* 144 N. C., 126; *Church v. Ange,* 161 N. C., 314; *College v. Riddle,* 165 N. C., 211; *Middleton v. Rigsbee,* 179 N. C., 440." *Stepp v. Stepp,* 200 N. C., 237.

The appellants contend that the court erred in holding that the petitioner, Edith Christian Woody, had only a contingent interest in the estate. Section 2 of Item 5 of the will reads: "If either of my said sons shall die before the expiration of twenty years after my death, leaving a child or children, then such child or children shall receive their father's share of said net income," etc. Construing the entire Item 5 of the will, we think the language "Receive their father's share of said *net income*" means that Edith Christian Woody would step in the shoes of her deceased father, and receive his share of the "net income remaining." The authorities cited by appellants do not apply to the facts in this case. We think the meaning of the language is clear.

The able briefs of the appellants have been helpful. For the reasons given, the judgment in the court below is

Modified and affirmed.

BROGDEN, J., not sitting.

J. K. ANDREWS v. L. R. JORDAN AND EUGENE TRANSOU.

(Filed 10 January, 1934.)

Arbitration and Award D d—N. C. Code, 43A held not to apply in this case, and provision that award must be made in certain time may be waived.

Where a cause has been referred, and pending the reference the parties agree to an arbitration and that the referee's conclusions of law should be based on the arbitrators' findings, the arbitration is not one submitted in accordance with the Uniform Arbitration Act, N. C. Code, 898(a), and the provisions of the act do not apply, and where hearings are held before the arbitrators more than sixty days after the submission to arbitration, and all parties are present or represented by counsel, the unsuccessful party may not wait until after the award has been made and then set up for the first time his contention that the award was of no effect because not made within sixty days after the submission, the provisions of the Uniform Arbitration Act, N. C. Code, 898(h), that an award should have no legal effect unless rendered within sixty days from the submission unless the parties agree in writing to an extension, being subject to waiver, and the award as rendered is binding on the parties.

APPEAL by defendants from *Clement, J.,* September Term, 1933, of ALLEGHANY. Affirmed.

While the above action was pending in the Superior Court of Alleghany County, N. C., at September Term, 1928, it was referred to J. H. Burke, referee, by order of the judge holding the term of court. Certain agreements were entered into by the parties and are set forth in the record. The material parts are included in the report of the referee and arbitrators, which is as follows:

"The undersigned arbitrators having been agreed upon by the parties to settle the matter of facts in the dispute between the plaintiff and defendants, find the following facts:

"(1) That summons was issued in the above entitled cause by the plaintiff against the defendants on 28 August, 1928, and duly served on the defendants on 29 August, 1928.

"(2) That the above entitled cause was referred to J. H. Burke, referee, at the September Term, 1928, of Superior Court of Alleghany County.

"(3) That after considerable evidence had been taken and several hearings before J. H. Burke, referee, it was stipulated and agreed by the parties and their attorneys that J. H. Burke, referee, and T. C. Lavinder and W. H. Combs, auditors, should act as arbitrators in said cause and find the facts in dispute between the parties to this suit, and as to the indebtedness of either party to the other; and it was further stipulated and agreed that the findings of facts by said arbitrators should be final and conclusive and binding on the parties, and should constitute the basis upon which said referee should draw his conclusions of law as to the respective liability of said parties, and that it was further agreed that the judgment or award signed by the referee and arbitrators should constitute the final settlement and judgment between the parties in said suit.

"(4) That after a number of hearings before said arbitrators, it was further agreed between the parties and their counsel that a third auditor should be called in to assist said arbitrators and court in arriving at the finding of facts, and that his cost should be paid equally between the plaintiff and defendants.

"(5) That it was agreed in writing between the plaintiff and defendants and their counsel that the findings of fact and conclusions of law in this case should in no way affect the second action brought in the Superior Court of Alleghany County by the plaintiff against defendants, which second cause was by consent continued to await the conclusion of this action.

"(6) That the referee and arbitrators, after many hearings, at all of which said parties were represented either in person or by attorney, and that on the 7th and 8th days of August, 1933, a final hearing of said cause was had in the town of Sparta, North Carolina, at which the following parties were present: J. K. Andrews, L. R. Jordan, Eugene Transou, Russell Whitener, attorney for J. K. Andrews, and J. H. Folger, attorney for L. R. Jordan, and after a full hearing and careful investigation the referee and arbitrators find as a fact that J. D. Andrews is entitled to recover of L. R. Jordan as principal and Eugene Transou as surety the sum of $2,762.25, with interest on the same from 28 August, 1928, until paid.

"(In arriving at the foregoing findings of fact, it has been assumed that L. R. Jordan and Eugene Transou have paid the amounts they agreed to pay and assumed to pay by the terms of the contract of dissolution, but if it should turn out that said amounts have not been paid by said parties, then these findings of fact shall in no way prejudice J. K. Andrews in any right that he may have against said parties by reason of their nonpayment of said amounts to the extent of said nonpayment.) W. H. Combs, W. E. Stevens, Arbitrators. J. H. Burke, Referee and Arbitrator."

Upon the foregoing findings of fact, J. H. Burke, referee and arbitrator, concludes as a matter of law:

"1. That J. K. Andrews is entitled to recover of L. R. Jordan, as principal, and Eugene Transou, as surety, the sum of $2,762.25, with interest on said sum from 28 August, 1928, until paid, and I further find as a matter of law:

2. That Eugene Transou is liable as surety for the payment of the said sum of $2,762.25, with interest thereon from 28 August, 1928, until paid.

3. That the agreement of arbitration signed by the parties and their counsel contained the following as the final clause thereof; 'It is further agreed that the judgment or award signed by the referee and arbitrator, J. H. Burke, shall constitute the final settlement and judgments between the parties in these causes.'

That under and by virtue of said clause and agreement, the referee and arbitrators recommend and award that the cost in this action shall be paid as follows: $10.00 to Miss Irene Lequex for stenographic work, to be paid ½ by plaintiff and ½ by the defendants. $205.45 to W. E. Stevens, to be paid ½ by plaintiff and ½ by the defendants: The amount due W. H. Combs, auditor selected by the plaintiff to be determined by the court, and paid by the plaintiff. The amount due T. C. Lavinder, auditor selected by the defendants, to be determined by the court, and paid by the defendants. That said parties pay J. H. Burke, referee, the additional sum of $100.00, ½ to be paid by the plaintiff and the other ½ to be paid by the defendants, and that all other costs in the case be paid by defendants, to be taxed by the clerk of the Superior Court of Alleghany County. This 28 August, 1933. J. H. Burke, referee and arbitrator. W. H. Combs and W. E. Stevens, arbitrators."

The defendants gave notice before Judge Clement, of the Superior Court of Alleghany County, N. C., on 1 September, 1933, that they would move to set aside and vacate the award by the arbitrators. "That not only more than sixty days, but more than twelve months, have elapsed since the time of the signing, making or entering of any agreement of arbitration in this cause or of any order in this cause and before the filing of the award or report of arbitrators, which report and award is dated 28 August, 1933, and filed 29 August, 1933. That a verified copy of said report and award is hereto attached and for the purpose of showing the date thereof is made a part of this affidavit. That affiants are informed and believe that the said award, finding and report have no legal effect; that no order or agreement has been made or entered agreeing to extend the time for making of the said award by said arbitrators and that the award so made and the report based thereon are of no legal effect."

In the defendants' brief is the following: "The defendants abandon assignment of error as to there being insufficient evidence to find that Eugene Transou was surety for all the hauling done by J. K. Andrews," etc.

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, J. H. Clement, judge presiding, upon a report of arbitration and motion to set aside same in the above entitled cause, and it appearing to the court that summons was issued in the above entitled cause by the plaintiff against the defendants on 28 August, 1928, and duly served on the defendants on 29 August, 1928, and that after the pleadings were filed in said cause the same was referred to J. H. Burke, referee, at the September Term, 1928, of Superior Court of Alleghany County; and it also appearing to the court that after considerable evidence had been taken and several hearings had before J. H. Burke, referee, that plaintiff and defendants and their attorneys agreed to an arbitration of the facts in dispute between the plaintiff and defendants, and agreed upon T. C. Lavinder and W. H. Combs and J. H. Burke as arbitrators, and it also appearing to the court that numerous hearings were had before said referee and arbitrators at which hearings the plaintiff and defendants were represented in person and by attorney, and that the time of said hearings were mutually agreed upon by the parties to said action; and it further appearing to the court that it was agreed by the parties that an additional arbitrator and auditor should be called in, and by agreement, W. E. Stevens was called in as an additional arbitrator. That several hearings were had of said cause before said arbitrators after said additional arbitrator was by consent agreed to and called in to aid in the settlement, and that said arbitrators or a majority thereof signed an award awarding to the plaintiff judgment in the sum of $2,762.25 against L. R. Jordan as principal and Eugene Transou as surety, with interest on the same from 28 August, 1928, until paid, and awarding additional cost as follows: $10.00 to Miss Irene Lequex for stenographic work, ½ to be paid by plaintiff and ½ by the defendants; $205.45 to W. E. Stevens, to be paid ½ by plaintiff and ½ by the defendants; J. H. Burke an additional $100.00, ½ to be paid by the plaintiff and the other ½ to be paid by the defendants, and that the amount due W. H. Combs, auditor selected by the plaintiff, to be fixed by the court, to be paid by the plaintiff, the court hereby fixes said sum at $........., to be paid W. H. Combs by plaintiff; that the amount due T. C. Lavinder, auditor selected by the defendants, is hereby fixed by the court at $........., said sum to be paid by the defendants, and that the remainder of the cost be paid by the defendants, to be taxed by the clerk. The court finds as a fact that the award was made more than 60 days from date of agreement to arbitrate: It is, therefore, upon motion of T. C. Bowie and Russell W. Whitener, attorneys for plaintiff, considered and adjudged that the report of said arbitrators be and the same is hereby in all respects confirmed, and that the plaintiff recover of the defendants, L. R. Jordan, as principal, and Eugene Transou, as surety, the sum of $2,762.25, with interest on the same from 28 August, 1928, until paid, and that the cost of said action be paid as recommended by said arbitrators, with the exception of the amounts fixed by the court, which are adjudged to be paid in accordance with amounts so fixed by the court, and has been recommended by said arbitrators."

Russell W. Whitener and T. C. Bowie for plaintiff.
C. W. Higgins and Folger & Folger for defendants.

CLARKSON, J. The defendants' exceptions and assignments of error relied on, were as follows: "His Honor erred in refusing to set aside the award of the arbitrators on motion of defendants upon the ground that the award was not made and, or filed within 60 days from the date of the agreement to arbitrate, no order or agreement having been made extending the time for making or filing such award. . . . That his Honor erred in entering judgment upon the award, for that said award was not made within 60 days from the date of the agreement to arbitrate and no order or agreement was made in writing extending the time for making such award." These exceptions and assignments of error cannot be sustained.

The defendants contend that the arbitration was governed by Public Laws, 1927, chapter 94—the Uniform Arbitration Act. N. C. Code, of 1931, annotated (Michie), Art. 43A, sec. 898(a), *et seq.* It provides: Section 898(h): "If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect unless the parties extend the time in which said award may be made, which extension or ratification shall be in writing."

Defendants contend that the above section applies to the present reference and arbitration. We cannot so hold. Section 898(a) of the above act is as follows: "Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract."

The parties to this controversy did not submit it to be arbitrated "in conformity with the provisions of this article." The action was pending in the Superior Court and referred by the court to a referee when the agreement to arbitrate was entered into. If defendants intended that the Uniform Arbitration Act and its provisions should apply, it should have been written in the agreement to arbitrate, as the case was then pending in the Superior Court before a referee. C. S., 572, 573. *McNeill v. Lawton,* 97 N. C., 16; N. C. Practice & Procedure in Civil Cases (McIntosh), p. 558, *et seq.,* at p. 559. (3)—Reference to arbitration.

In *Hill v. Insurance Co.,* 200 N. C., 502 (510), speaking to the subject: "This arbitration is under the terms of the policy. It may be noted that Laws, 1927, chap. 94, makes provision for arbitration by agreement of parties."

It may be noted that the report of the arbitrators in part, is as follows: "That the referee and arbitrators, after many hearings, at all of which said parties were represented either in person or by attorney, and that on the 7th and 8th days of August, 1933, a final hearing of said cause was had in the town of Sparta, North Carolina; at which the following parties were present: J. K. Andrews, L. R. Jordan, Eugene Transou, Russell Whitener, attorney for J. K. Andrews, and J. H. Folger, attorney for L. R. Jordan, and after a full hearing and careful investigation the referee and arbitrators find as a fact, that J. D. Andrews is entitled to recover of L. R. Jordan as principal, and Eugene Transou, as surety, the sum of $2,762.25, with interest on the same from 28 August, 1928, until paid."

The court below in the judgment set forth the following: "And it also appearing to the court that numerous hearings were had before said referee and arbitrators at which hearings the plaintiff and defendants were represented in person and by attorney, and that the time of said hearings were mutually agreed upon by the parties to said action."

The defendants, when notified of the hearings, were present in person and by attorneys and took part in the hearings and made no objection to the time, which was mutually agreed upon. They thereby waived any right to attack the award.

Commercial Arbitration and Awards (Sturges, 1930), at p. 524-5, says: "It is fully recognized in submissions generally that an extension agreement may be implied as well as expressed. Thus, if the parties participate in the arbitral hearing without objection to the point that a time limitation has expired it will be held generally that they have thereby waived the time provision. More frequently, perhaps, this proposition is stated as being a waiver by the party who objects to the conclusiveness or enforceability of a delayed award after he has so participated in an arbitration. Such conduct has been held effective as a waiver of a time limitation in a submission agreement which was under seal." *Nelson v. R. R.,* 157 N. C., 194 (202-3).

In Morse on Arbitration and Award, p. 104-5, we find: "It will be observed that the matter of the time when the objection is to be taken is of the essence of this matter of waiver. The rule is that it must be taken by the party aggrieved so soon as he becomes aware of the existence of the fact creating the incompetency. It is likened to the case of challenging a juror. The party will not be allowed to lie by after he has attained the knowledge, and proceed with the hearing without objection, thereby accumulating expense and taking his chance of a decision in his favor, and then, at a later stage, or after a decision has been, or seems likely to be, rendered against him, for the first time produce and urge his objection." We see no error in the judgment of the court below.

Affirmed.

IN RE GEORGE O. HEGE, EXECUTOR OF THE ESTATE OF EMMA A. STEVENSON, RESPONDENT.

(Filed 10 January, 1934.)

1. **Executors and Administrators G a—Clerk may force executor to file accounting under penalty of contempt.**

An executor is required to file an annual accounting of the decedent's estate, C. S., 105, with the right of the interested parties to file a suit in equity to surcharge and falsify the account, C. S., 135, or, upon a shortage in the estate, the executor may be prosecuted for embezzlement, C. S., 4268, and the clerk of the court can order the executor to file an annual accounting, and upon his wilful failure to do so, or his filing of an insufficient and unsatisfactory account, and his wilful refusal to file a full and satisfactory account within twenty days after the clerk's order to do so, he may be attached by the clerk for contempt, upon a proper showing, C. S., 106, and committed until he complies with the clerk's order, or the clerk may remove him.

2. **Contempt of Court B b—It is required that facts upon which judgment for contempt is based should be set forth.**

Where the clerk of the court attaches an executor for contempt for failure to file a satisfactory accounting as ordered, and in the accounting filed there are controverted matters as to whether the executor had overpaid some of the beneficiaries while underpaying others, and as to whether the executor was entitled to certain commissions, or whether the failure of the executor was a wilful violation of the clerk's order for him to file a full and sufficient account, it is required that the clerk set forth the evidence with his findings and conclusions, and upon his failure to have sufficiently done so his order of commitment for contempt will be remanded to him for that purpose.

3. **Contempt of Court A e—Contempt being criminal in its nature the relative statutes must be strictly construed.**

A proceeding for contempt of court is *sui generis*, and though criminal in its nature, may be resorted to in civil as well as criminal matters, and the order attaching the defendant for contempt must be based upon evidence set out in the proceedings, together with the court's findings of fact and conclusions of law, and where the alleged contempt is the failure to comply with an order of court, it is especially necessary that it be found that such failure was wilful and unlawful, C. S., 978(4), and the statute, being criminal in its nature, must be strictly construed.

APPEAL by respondent, George O. Hege, from *Sink, J.*, at June Term. 1933, of FORSYTH. Reversed and remanded.

The clerk of the Superior Court of Forsyth County, on 16 February, 1933, adjudged the respondent, George O. Hege, guilty of contempt and ordered him to be committed to the common jail of Forsyth County. The clerk in part rendered the following judgment: "In its discretion the court refused to accept the report tendered for the reason that it is not sufficient according to law, and the court finds as a fact that George

O. Hege, is in direct contempt of this court and adjudged the said George O. Hege, respondent, in direct contempt of court; and the court finds as a fact that he has wilfully disobeyed the orders of this court in refusing to file report in accordance with its orders and he still wilfully refuses to file report as executor of the estate of Emma A. Stevenson, deceased, as heretofore directed in an order of this court. It is, therefore, ordered and adjudged that George O. Hege be and he is hereby committed to the common jail of Forsyth County until he exhibits and files report as executor of the estate of Emma A. Stevenson, deceased, according to law and exhibits with said report vouchers and receipts as the law directs to support disbursements shown therein. This 16 February, 1933."

The record discloses that: "On 25 February, 1933, respondent was again brought before the clerk and Mr. P. N. Parrish (clerk's auditor), and minor corrections made after which respondent made out and tendered a new report in accordance with said auditor's report. Copies of said report were mailed to all interested parties by the clerk. After which R. C. Rights, Dora Rights, Louis Rights and Mary Lineback, filed protest against the clerk allowing commissions. A date was set for hearing on said protest and at said hearing no one appearing to substantiate said protest; the respondent moved to dismiss same and approve the report. Motion denied and respondent excepted."

The respondent sued out a writ of *habeas corpus* before Judge Sink, and among other findings before him is the following: "That the said Geo. O. Hege, executor of the estate of Emma A. Stevenson, deceased, was committed to the common jail of Forsyth County by W. E. Church, clerk of the Superior Court, upon an order and finding of facts, 16 February, 1933; that the said finding of facts are adopted by this court and found to be the facts pertaining to the said commitment by the clerk of the Superior Court and are made a part of this judgment. . . . (4) That upon the matter coming on to be heard the respondent filed an affidavit in the said cause (following and marked Exhibit A) a copy of which is attached hereto and made a part of this judgment. That in addition to the finding of facts by the clerk and the findings herein contained the court further finds as a fact that the said Geo. O. Hege did file with the clerk of the Superior Court a report purporting to be a final report as executor of the estate of Emma A. Stevenson, deceased, which report the court finds contained figures which were acceptable to the clerk of the Superior Court if and when settlement in accordance with the said figures is made; that the respondent admitted that he had not made settlement with the clerk of the Superior Court in accordance with terms of the figures contained in the report presented by him to the said clerk. It is, therefore, considered, ordered and adjudged, that Geo. O. Hege, be and is hereby remanded to the common jail of Forsyth County under the terms of the commitment of W. E. Church, clerk of the Superior Court, there to remain until he complies with the orders of the said clerk or is otherwise discharged according to law."

The record discloses that the respondent was dilatory for some period of time in making his return, after repeated notices by the clerk. The respondent contended "that he has overpaid seven heirs more than enough to finish paying the remaining three, and the inheritance tax." That the clerk refused to allow him commission, $804.63, although the estate was in litigation for two years and was benefited by same. That the clerk required him to be chargeable with certain interest which was incorrect, on inheritance tax amount to $106.28.

"Analysis of report referred to in paragraph 4 of Judge Sink's findings of facts, as compiled from said report and the report of auditor:

Total amount of assets		$ 11,424.31
Total collections	$ 13,797.77	
Total disbursements	6,214.22	
	$ 7,583.55	

to be equally divided between ten heirs, which would be equal to $758.35 each.

Report shows that the estate was in litigation until 28 March, 1928.

The following distribution made to heirs between 1 December, 1925, and 28 September, 1928:

		Paid	*Overpaid*
Annie Mock, due 1 share	$ 758.35	$ 818.09	$ 59.73
Louis Rights, due 1 share	758.36	813.00	54.64
R. C. Rights, due 1 share	758.36	818.09	59.73
Will Rights, due 1 share	758.36	818.09	59.73
Mary Lineback, due 1 share	758.36	793.09	34.73
Agnes Rights, due 1 share	758.36	817.89	59.57
Dora Rights, due 1 share	758.36	818.09	59.73
			Unpaid
Arthur Jenkins, due 1 share	$ 758.36	$ 700.00	$ 58.36
Lizzie Jenkins, due 1 share	758.36	700.00	58.36
Daisy Jenkins, due 1 share	758.36	700.00	58.36

All of above paid to heirs prior to 1 January, 1929. Leaving due:

Inheritance tax	$ 272.46
Clerk of court auditing and filing	16.35

The following heirs joined in filing protest referred to in proceedings before the clerk: Annie Mock, R. C. Rights, Louis Rights, and Mary Lineback."

From the above report $7,583.60 was due the heirs, and they were overpaid $562.94. It will be noted that four of the heirs who were overpaid filed a protest, also that those heirs who filed protest against the clerk allowing commissions did not appear to substantiate the protest.

The record further shows an affidavit by respondent (Exhibit A referred to by Judge Sink) that in part says: "Deponent therefore disavows any intent to be in contempt of court or any of its officers, that he diligently and faithfully tried to the best of his ability to comply with not only all demands made by the clerk but any suggestions which the clerk would make, that he has not only in this instance but in all other instances acted with the utmost respect for the court and all of its officers and their authority and has not in the present case or any other case ever intended to either impede, delay or wilfully disobey the orders of the clerk or any officer of the court."

George O. Hege in persona propria.

CLARKSON, J. The record discloses that: "Copies of said report were mailed to all interested parties by the clerk. After which R. C. Rights, Dora Rights, Louis Rights and Mary Lineback, filed protest against the clerk allowing commissions. A date was set for hearing on said protest and at said hearing no one appearing to substantiate said protest; the respondent moved to dismiss same and approve the report. Motion denied and respondent excepted."

It appears from the record that there were several controverted questions arising on the final report. Copies of the report were mailed to all interested parties by the clerk. They took no action before the clerk. The interested parties had a right to file a bill in equity to surcharge and falsify the account or proceed under C. S., 135. *S. v. McCanless,* 193 N. C., 200. C. S., 48, requires an inventory within three months. The clerk, under C. S., 49, can compel an executor to file an inventory or remove him. C. S., 105, requires an annual accounting. C. S., 106, is as follows: "If any executor, administrator or collector omits to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office." C. S., 109, provides for final account.

The record shows that the clerk was diligent and active in performing his duty under the above statutes. C. S., 110, provides that creditors may bring a special proceeding for accounting. C. S., 150—Representative must settle after two years. Public Laws, 1933, chap. 188, amends this section giving clerk authority to extend final settlement of estates for five years with approval of judge. C. S., 152, provides that after final account representative may petition for settlement. C. S., 157, commissions allowed representatives. *Bank v. Bank,* 126 N. C., 531; *Kelly v. Odum,* 139 N. C., 278; *Thigpen v. Trust Co.,* 203 N. C., 291. C. S., 4268, is as follows: "If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any officer or agent of a corporation, or any agent, consignee, clerk or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use any money, goods or other chattels, bank notes, checks or order for the payment of money issued by or drawn on any bank or other corporation or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any State, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in case of larceny."

The law as above set forth is ample and plenary to protect estates from the ravages of unjust stewards. Under certain circumstances they can be punished for contempt and indicted for embezzlement. It is important that the clerks should hold these fiduciaries to a strict accountability and the clerk of Forsyth County is to be commended for a compliance with the statute. While this is so, the individual is entitled to a just accounting. These disputed matters, like commissions, interest, overpayments, etc., claimed by the executor, respondent in this controversy, should be carefully gone into and considered. Testimony should be heard on each contested item and the facts carefully set out and found, and the clerk on the facts found should declare the law. The executor, as in this case, can except to the findings of fact and conclusions of law and appeal to the Superior Court.

In Mordecai's Law Lectures, Vol. 2 (2d ed.), p. 1339-40, speaking to the subject: "These *ex parte* accounts filed and audited are not conclusive and an estoppel on either the personal representative who files them, or on the legatees and next of kin. But such an account is prima facie correct and places the burden of proof on him who alleges the contrary. Should the personal representative and beneficiaries of the estate enter into a controversy over the accounts before the clerk, and the clerk state the account in such controversy, it may be, and probably is, the law, that the account so stated would be binding and an estoppel on those participating in such controversy. In such a controversy either party, I take it, could appeal to the judge in term or out of term." *Ex Parte Spencer,* 95 N. C., 271; *Bean v. Bean,* 135 N. C., 92; *Marler v. Golden,* 172 N. C., 823. C. S., 637.

Now we come to consider the question of contempt. C. S., 978: "Any person guilty of any of the following acts may be punished for contempt: (subsec. 4) Wilful disobedience of any process or order lawfully issued by any court."

A contempt proceeding is *sui generis.* It is criminal in its nature, and that the party is charged with doing something forbidden, and, if found guilty is punished. Yet it may be resorted to in civil or criminal action. *In the Matter of Lewis,* 202 U. S., 514, 50 L. Ed., 1172. In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on these findings. *In re Odum,* 133 N. C., 250; *West v. West,* 199 N. C., 12.

Contempt proceedings is criminal in its nature, and must be construed strictly.

In *S. v. Banks,* 143 N. C., 657, we find: "The word 'wilful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law." In *S. v. Falkner,* 182 N. C., p. 798, it is said: "The term *unlawfully* implies that an act is done, or not done as the law allows, or requires; while the term *wilfully* implies that the act is done knowingly and of stubborn purpose." *West v. West, supra,* p. 15.

We think that evidence should be taken by the clerk on all the disputed matters and a complete statement of the account made up by him and his conclusion of law found thereon. From the present state of the record, we cannot hold that there was a wilful disobedience of any process or order lawfully issued by the clerk. For the reasons given, the cause is

Reversed and remanded.

BENET POLIKOFF, RECEIVER OF SHIELDS FURNITURE COMPANY, v. FINANCE SERVICE COMPANY.

(Filed 10 January, 1934.)

1. **Usury A b—Findings in this case held sufficient to support judgment that plaintiff recover twice the amount of usury paid.**

   Where in sustaining an exception to the referee's finding that the contract in question was governed by the laws of another state, the court finds that the stipulation in the contract that the laws of such other state should apply was made in bad faith for the purpose of evading the usury laws of this State, and that defendant charged and received payment of usurious interest, the findings are sufficient to support a judgment in plaintiff's favor that he recover of defendant twice the amount of usurious interest paid as determined by the laws of this State. C. S., 2306.

2. **States A a—Stipulation that contract is governed by laws of another state is void where it is made in bad faith to avoid usury laws.**

   Where a contract for the loan of money stipulates that the laws of another state should govern, and such stipulation is inserted in the contract in bad faith in order to evade the usury laws of this State, our courts will disregard the stipulation and apply the provisions of our laws in an action by the borrower to recover twice the amount of usury charged and received, and the evidence in this case is held sufficient to support a finding of bad faith.

3. **Reference C a—**

   The trial court may overrule a finding by the referee upon exceptions duly taken, and make additional findings in regard to the matter, and base an adverse conclusion of law thereon.

4. **Usury A a — In determining whether contract is usurious, the courts will look to its substance and not its form.**

   In construing a contract in reference to usury the courts will look to its substance and not to its form, and a contract will be declared usurious when it appears that it was the purpose and intent of the lender to charge and receive a greater rate of interest than that allowed by law. C. S., 2305.

APPEAL by defendant from *Clement, J.,* at October Term, 1933, of Forsyth. Affirmed.

The judgment in the Forsyth County Court is as follows:

"This cause coming on to be heard before his Honor, Oscar O. Efird, judge presiding at the 12 June, 1933, term of the Forsyth County Court, and being heard upon the report of Honorable H. R. Starbuck, referee heretofore appointed by this court, and upon the exceptions to the report filed by both the plaintiff and the defendant as appears of record and the court, after careful consideration of the evidence taken before the referee and the exceptions signed by both the plaintiff and the defendant, and after hearing and considering the arguments and briefs of counsel, the court being of the opinion that the exceptions Nos. 1, 2 and 3 filed by the defendant should be and the same are hereby overruled, and that exceptions 1, 2, 3 and 5 assigned by the plaintiff should be, and they are hereby overruled, except as hereinafter modified, and being of the further opinion that the fourth assignment of error of the plaintiff should be and the same is hereby sustained, and the court being of the further opinion, and so finds, that the contracts are governed by the laws of the State of North Carolina, and that the plaintiff is entitled to recover and that the laws of Maryland do not control for the reason that the stipulation that the laws of Maryland should apply was made for the purpose and with the intent of evading the usury laws of the State of North Carolina, and, except as herein modified, the report of the referee is affirmed.

Now, therefore, upon motion of Fred. S. Hutchins, attorney for the plaintiff, it is considered, ordered, adjudged and decreed that the plaintiff recover judgment against the defendant in the sum of $2,711.00, as penalty for usury as provided by the laws of North Carolina, with interest thereon from 13 March, 1929, the date of the institution of the said suit, and for the cost of the court to be taxed by the clerk, including an allowance of $100.00 to be paid H. R. Starbuck, referee.

It is further ordered, adjudged and decreed, that the plaintiff recover judgment against the bondsman, the Maryland Casualty Company, on its undertaking on the discharge of the attachment in the sum of $3,000 to be discharged upon the payment of the amount of this judgment including all the cost taxed herein against the defendant."

The defendant made numerous exceptions and assignments of error and appealed to the Superior Court. The judgment in that court is as follows:

"This cause coming on to be heard and being heard before his Honor, J. H. Clement, judge presiding at the October Term, 1933, of the Superior Court of Forsyth County, on appeal from the judgment of the Forsyth County Court, and it having been agreed between counsel for the plaintiff and defendant, that this judgment should be rendered out of term, *nunc pro tunc,* and after argument of counsel and consideration of the record, the court being of the opinion that the assignments of error of the defendant from one to six inclusive are without merit and should be overruled, and that the judgment of the county court should be affirmed.

Now, therefore, upon motion of Fred S. Hutchins, attorney for the plaintiff, it is ordered and decreed that the assignments of error from one to six of the defendant, appellant, are without merit and should be and are hereby overruled and that the judgment of the county court should be and the same is hereby affirmed with the cost of the appeal to be taxed against the defendant. And this cause is remanded to the Forsyth County Court in accordance with this opinion."

The defendant appealed from this judgment to the Supreme Court. The necessary exception and assignment of error for a decision of the controversy will be set forth in the opinion.

Fred S. Hutchins and H. Bryce Parker for plaintiff.
Parrish & Deal for defendants.

CLARKSON, J. The only exception and assignment of error that we think necessary to consider as determinative of this controversy is as follows: "That the Forsyth County Court erred in overruling the defendant's motion that the action be dismissed, for that the evidence introduced by the plaintiff does not make out a cause of action, and to the entry of the judgment appearing in record." We see no error in the ruling of the Forsyth County Court, which was affirmed on appeal to the Superior Court. The Forsyth County Court in its judgment found: "And being of the further opinion that the fourth assignment of error of the plaintiff should be and the same is hereby sustained, and the court being of the further opinion, and so finds, that the contracts are governed by the laws of the State of North Carolina, and that the plaintiff is entitled to recover and that the laws of Maryland do not control for the reason that the stipulation that the laws of Maryland should apply was made for the purpose and with the intent of evading the usury laws of the State of North Carolina.

The fourth assignment of error of plaintiff, sustained by the Forsyth County Court, and affirmed on appeal to the Superior Court, is as follows: "Fourth exception—That the referee found as a conclusion of law that the contracts are governed by the laws of the State of Maryland and, therefore, that the plaintiff is not entitled to recover as set out in the referee's conclusion of law No. 2. Whereas, he should have found that the contracts are governed by the laws of the State of North Carolina, and that the plaintiff is entitled to recover and that the laws of Maryland do not apply *for the reason that the contract stipulation that the law of Maryland should apply is in bad faith and for the purpose and intent of evading the usury laws of the State of North Carolina."* (Italics ours.)

In *Bundy v. Credit Co.,* 200 N. C., 511 (515), this Court, quoting from *Zimmerman v. Brown,* 166 Pac., 924, says: "By the great weight of authority it is held that, in a case like the present one, every presumption is against an intention to violate the law, so that where notes are executed in one State and payable in another, the parties will be presumed to have contracted with reference to the law of the place where the transaction would be valid rather than in view of the law by which it would be illegal, provided, however, that there is no evidence of bad faith or of an intention to evade the usury law of the latter State. Therefore, when a contract is usurious by the law of the State wherein it was made, but not according to that of the State wherein it is to be performed, the parties will be presumed to have contracted with reference to the law of the latter State, and the contract will be upheld, subject to the conditions of good faith just set forth."

In *Bundy v. Credit Co.,* 202 N. C., 604 (607), we find: "Bad faith cannot be defined with mathematical precision. The ultimate definition of the term would depend upon the facts and circumstances of a given controversy. Certainly, it implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack."

We think that, taking the fourth assignment of error of plaintiff, which was sustained, and the further finding of fact by the judge of the Forsyth County Court, affirmed by the court below, it is sufficient to support the judgment.

In *Abbitt v. Gregory,* 201 N. C., 577 (596), we find: "In *Trust Co. v. Lentz,* 196 N. C., 398 (at page 406), 145 S. E., 776, it is said: 'In view of the position taken by some of the parties that the judge was without authority to change the report of the referee—the reference being by consent—it is sufficient to say that, in a consent reference, as well as in a compulsory one, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, may affirm, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. *Contracting Co. v. Power Co.,* 195 N. C., 649, 143 S. E., 241; *Mills v. Realty Co.,* 196 N. C., 223, 145 S. E., 26.'" *Moore v. Brinkley,* 200 N. C., 457; *Wallace v. Benner,* 200 N. C., 124; *Thigpen v. Trust Co.,* 203 N. C., 291 (295).

We think there was sufficient evidence for the court below to find the facts as above set forth. The general principle is thus stated in 53 A. L. R., at p. 746: "The later cases substantiate those cited in the earlier annotation to the effect that a court, in deciding whether or not a transaction is usurious, will disregard its form and look to the substance, and will condemn it if all the requisites of usury are found to be present, despite any disguise it may wear, and that the question of good faith in exacting or receiving a charge which is ostensibly for an expense of the loan is often a decisive factor in determining whether or not the transaction is usurious," citing *Ripple v. Mortgage Corp.,* 193 N. C., 422.

In *Bank v. Wysong,* 177 N. C., 380 (388): "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguise, and decided according to its substance and its necessary tendency and effect, when the purpose and intent of the lender are unmistakable. And this is the correct rule."

In *Bundy v. Credit Co., supra,* at p. 516, it is stated: "The general principle recognized in all jurisdictions is that ordinarily the execution, interpretation and validity of a contract is to be determined by the law of the State or county in which it is made."

In *Ripple v. Mortgage Corp., supra,* at p. 428, the following able instruction by *Oglesby, J.,* to the jury was approved: "Now, gentlemen of the jury, if the place of payment was specified as in the State of Maryland, for the purpose of avoiding the usury laws of North Carolina, and if it were a scheme or method to avoid the usury laws of North Carolina, and that was the reason for the place of payment being provided in Maryland, then your answer to the second issue would be 'No'; that they were not to be performed in Maryland, because if providing the place of payment as Maryland was a scheme to evade and whip around the usury laws of North Carolina, and was not done in good faith, then the place of payment, so far as the law is concerned, would not be in Maryland."

In *Clark v. Bank,* 200 N. C., 635, "The statutory penalty for charging usury is the forfeiture of all interest on the loan; it is only when the borrower had paid usury to the lender of money, that he can recover in a civil action as the statutory penalty for taking and receiving usury, twice the amount paid," citing C. S., 2306, and many authorities.

C. S., 2305, is as follows: "The legal rate of interest shall be six per cent per annum for such time as interest may accrue, and no more."

In *Pugh v. Scarboro,* 200 N. C., 59 (64), we find: "The humanities of all civilized nations has condemned usury, a species of ingenious oppression, especially in this day. It may be well for us to hark back to the Mosaic law, where we find: 'If thy brother be waxen poor, and fallen in decay with thee, then thou shalt relieve him; yea, though he be a stranger, or a sojourner, that he may live with thee. Take thou no usury of him, or increase, but fear thy God, that thy brother may live with thee. Thou shalt not give him thy money upon usury, nor lend him thy vituals for increase.' Lev. xxv, 35-37."

In the present case it was in evidence that the interest charged on different loans, the percentage rate was: 16.58, 16.76, 17.52, 17.62, 17.68, 17.86, 18.00, 18.05, 18.29, 18.35, 19.06, and 20.29. It is a matter of common knowledge that such exorbitant usury would naturally cause the company to fail and go into the hands of a receiver, as in the present case. This enormous percentage rate no doubt caused the death of this industrial corporation. The judgment of the court below is

Affirmed.

ELSIE MOORE, BY HER NEXT FRIEND, JOHN H. MOORE, v. E. R. POWELL.

(Filed 10 January, 1934.)

1. **Trial D a—On motion of nonsuit all the evidence is to be considered in the light most favorable to plaintiff.**

   On a motion as of nonsuit all the evidence, whether offered by plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Appeal and Error E b—**

   Where the charge of the court is not in the record it will be presumed on appeal to correctly charge the law applicable to the facts.

3. **Automobiles C f—Evidence of defendant's negligence in view of presence of small child on shoulders of highway held sufficient.**

   The evidence in this case tended to show that plaintiff, a child of ten years, was walking with another child on the shoulders of a highway, that a short distance away several women and children were standing or walking on the shoulders of the highway, and that the road was straight and the view unobstructed, that near the place of the accident there were several houses and a filling station, and that defendant was driving his car at a rate of thirty-five or forty miles an hour and did not blow his horn or give any signal of his approach, and that plaintiff ran in front of his car and was struck and injured thereby. *Held,* a driver is required by statute to slow down and give a warning signal upon approaching pedestrians on the traveled part of a highway, C. S., 2616, and the law requires more than ordinary care in regard to children, and requires that a car shall not be driven at a speed which endangers the life or limb of any person, C. S., 2618, and the evidence of defendant's negligence was properly submitted to the jury.

4. **Automobiles C i—Contributory negligence of pedestrian will not excuse driver if driver should have been able to avoid accident.**

   The contributory negligence of a child in running in front of an automobile will not excuse the driver of liability if, under all the circumstances, the driver should have had his car under such control and running at such speed as to have enabled him to have avoided the accident after seeing the child, or after he could have seen the child in the observance of a proper lookout.

APPEAL by defendant from *Sink, J.*, and a jury, at June Term, 1933, of ROCKINGHAM. No error.

This is an action for actionable negligence brought by plaintiff against defendant alleging damages. The evidence was to the effect that the plaintiff, Elsie Moore, is a small child who, on the date of her injury in April, 1932, was ten years of age. She lived in a rather thickly settled rural community about three miles west of Reidsville, North Carolina, on State Highway No. 48. This highway was hard-surfaced for a width of eighteen feet, with ordinary dirt shoulders. The plaintiff's home is forty-six steps from the hard surface. There are three other homes facing along this road in close proximity ranging from forty-six to fifty-three steps apart. These other homes are from twelve to fifteen steps back from the hard surface. A service station is located 76 steps from the last house. The highway at this point is straight. The shoulders were clear of trees, bushes or shrubbery. The view was unobstructed for two hundred yards or more in each direction from the place of the injury. The plaintiff, her mother, Mrs. John Moore, the plaintiff's three little sisters, aged three, five and nine, respectively, and Mrs. Malta Moore, were standing along the shoulder of the road. They had gone there to look for wild lettuce or wild salad which was growing there. Mrs. John Moore, Mrs. Roy (Malta) Moore and two of the little children were standing on the shoulder on the south side of the road (opposite plaintiff's home) about six or eight feet from the mail box. The plaintiff and her little sister Ruby were standing about the middle of the shoulder on the same side of the road but about fifty feet from them in the direction of Reidsville. The defendant was driving his automobile along Highway No. 48, en route from Wentworth to Reidsville. He was accompanied by another. He was driving from thirty-five to forty miles per hour. "They were in conversation with each other"—talking as though they were in close conversation. They saw the women and the children standing along beside the road. The defendant himself testified: "When I first saw these people, I was a good ways back up the road." Defendant did not blow his horn or give any signal—"Might have been straddling the center." The plaintiff did not hear the car as it approached. She started across the road—"She was going kinder angling, more in the direction of Reidsville." Mrs. John Moore testified: That was somewhat the same direction in which the defendant was traveling. Just before she was struck she was made aware of the approach of the automobile. She threw her hands up and screamed. The car hit her when she was "about half way between the middle of the hard surface and the shoulder on the left." She was thrown into the air, fell on the right fender and later dropped to the concrete. She was severely and permanently injured.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged? Answer: Yes.

2. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,500."

Judgment was rendered on the verdict by the court below, and defendant appealed to the Supreme Court.

Harry L. Fagge and Glidewell & Gwyn for plaintiff.
Sharp & Sharp for defendant.

CLARKSON, J. At the close of plaintiff's evidence, and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error. We think there was sufficient competent evidence to be submitted to the jury.

Upon a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be considered in the light most favorable to the plaintiff and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

The charge of the court below is not in the record, and the presumption of law is that the learned judge charged the jury correctly the law applicable to the facts.

The law of the road—C. S., 2616, is in part: "Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling."

C. S., 2618, provides: "No person shall operate a motor vehicle upon the public highways of this State recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highway, or so as to endanger the property or the life or limb of any person," etc.

In *S. v. Gray,* 180 N. C., 697 (701), speaking to the subject: "The vigilance and care required of the operator of an automobile vary in respect to persons of different ages and physical conditions. He must increase his exertions in order to avoid danger to children, whom he may see, or by the exercise of reasonable care should see, on or near the highway. More than ordinary care is required in such cases. *Deputy v. Kimmell,* 80 S. E. (W. Va.), 919; 8 N. & C. Cases, 369. Moving quietly, as an automobile does, without the noise which accompanies the movement of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collision with pedestrians unaware of its approach. The speed should be limited, warnings of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. Berry on Automobiles, sec. 124; Huddy on Automobiles (4 ed.), sec. 214. In *S. v. Gash, supra* (177 N. C., 598), the court below charged the jury: 'If the defendant was operating the car lawfully and at the rate of speed permitted by law, yet if by reason of a failure to keep a proper lookout he failed to see the deceased in time to avoid injuring him, and "by reason of his carelessness and negligence in failing to keep this lookout" he caused the death of the child, he was guilty.' The Court held that in this charge there was no error."

In *Goss v. Williams,* 196 N. C., 213 (221-2), the following able charge of Judge Sinclair, in the court below was sustained: "You are instructed that even though the injured party through his own negligence placed himself in a position of peril he may recover if the one who injured him discovered, or by the exercise of ordinary care could have discovered him in time to have avoided the injury. The defendant would not be relieved of liability by reason of the fact that he did not see him, but the law holds him to the responsibility of seeing what he could have seen by keeping a reasonably vigilant and proper lookout. You are instructed that the mere fact that a child runs in front of a moving vehicle so suddenly that the driver had no notice of danger, does not necessarily relieve the defendant from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver to avoid the accident after seeing the child, or when by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury, there being a greater degree of watchfulness and care required of automobile drivers as to children than adults." This charge correctly states the humane doctrine.

In *Davies v. Mann,* 10 M. & W., 546, Shirley's Leading Cases in the Common Law (3d English Edition), p. 269, we find: "The owner of a donkey fettered its forefeet, and in that helpless condition turned it into a narrow lane. The animal had not disported itself there very long when a heavy wagon belonging to the defendant came rumbling along. It was going a great deal too fast, and was not being properly looked after by its driver; the consequence was that it caught the poor beast, which could not get out of the way, and killed it. The owner of the donkey now brought an action against the owner of the wagon, and, in spite of his own stupidity, was allowed to recover, on the ground that if *the driver of the wagon had been decently careful the consequences of the plaintiff's negligence would have been averted.*" "How much then is a man better than a sheep." Matthew 12, part v. 12. Is a donkey better than a child? The question answers itself. In the judgment of the court below, we find

No error.

STATE v. CLYDE FERRELL.

(Filed 10 January, 1934.)

1. **Criminal Law E a—Asking of questions on arraignment by solicitor is not ground for objection where court is present and directs proceedings.**

   An arraignment in a criminal action is but the calling of the defendant to the bar of the court to answer the matter charged in the bill of indictment, and where the questions are asked by the solicitor in the presence of the judge with his consent and under his direction, the arraignment is not void on the ground that the questioning should have been conducted by the judge directly or by the clerk of the court.

2. **Homicide G e—Evidence of defendant's guilt of murder in the first degree held sufficient to be submitted to the jury.**

   Evidence tending to show that the defendant on trial for a homicide drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station and held up the proprietor at the point of pistols, that deceased was with the proprietor in the building, that the proprietor dodged and went into an adjoining room, armed himself with a pistol and shot gun, and pointed the pistol at his assailants through a crack in the door, whereupon the two robbers ran out, and that deceased was then killed by a shot from a gun fired from the outside, and that after the firing of the fatal shot, the proprietor ran to the window and fired his gun after the automobile in which the robbers were fleeing, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. C. S., 4200.

3. **Criminal Law G b—Evidence of guilt of other crimes may be competent to establish identity and guilty knowledge.**

   While ordinarily evidence of the commission by the defendant of offenses separate and distinct from the one on which he is being tried is incompetent, such evidence may be competent when it tends to show and is admitted for the purpose of showing defendant's guilty knowledge or for the purpose of identification, and in this case, in which defendant was charged with murder in an attempted robbery of a filling station to which defendant had driven in a car with certain companions identified as perpetrators of the attempted robbery, evidence that defendant had been riding around with the same companions and that they had committed several robberies, is held competent to show defendant's knowledge of the purpose of robbery and to establish his identity as the driver of the car.

4. **Homicide H c—Court need not instruct jury as to lesser degrees of crime when all evidence shows that crime was first degree murder.**

Where upon the trial for murder all the evidence tends to show that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error. C. S., 4640.

APPEAL by defendant from *Barnhill, J.*, at March Term, 1933, of DURHAM. No error.

At March Term, 1933, of the Superior Court of Durham County an indictment was returned by the grand jury as follows:

"The jurors for the State upon their oath present that Clyde Ferrell, A. G. Ferguson and Bill Sawyer, late of Durham County, on 2 March, 1933, each, with force and arms, at and in said county, feloniously, wilfully and of his malice aforethought, did kill and murder one Thaddeus Tilley contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

Upon their arraignment on said indictment, the defendants named therein, each, entered a plea of not guilty. Thereafter, pending the trial, and before the introduction of evidence, A. G. Ferguson and Bill Sawyer, with the consent of the court, withdrew their pleas of not guilty, and entered, each, a plea of guilty of being an accessory before the fact to the murder charged in the indictment, as defined by C. S., 4175.

The trial proceeded thereafter as to the defendant, Clyde Ferrell. There was a verdict that said defendant is guilty of murder in the first degree.

From judgment that the defendant, Clyde Ferrell, suffer death as prescribed by statute (C. S., 4657, *et seq.*), the said defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

A. A. McDonald, M. M. Leggett, H. E. Murphy, McLendon & Hedrick and W. S. Lockhart for defendant.

CONNOR, J. When the defendants named in the indictment on which this action was prosecuted were called to the bar of the court for their arraignment, the solicitor for the State, in behalf and with the approval of the judge, propounded to the defendants questions as to their pleas in accordance with the forms and procedure which have been from time immemorial and are now in general use in this State. On his appeal to this Court, the defendant, Clyde Ferrell, contends that his arraignment was void because the questions were propounded to him by the solicitor and not by the judge or by the clerk of the court. This contention cannot be sustained. "An arraignment," says *Lord Hale,* "is nothing but the calling of the offender to the bar of the court to answer the matter charged against him by indictment or by appeal." It is immaterial that the defendant was arraigned by the solicitor. The record shows that the arraignment was in open court, under the immediate supervision of the judge, and that the defendant entered his plea of not guilty under the advice of counsel. This was sufficient.

The evidence introduced by the State at the trial tended to show that on the night of 2 March, 1933—at about 9:15 o'clock—a Ford sedan in which three men were riding, stopped in front of a filling station located on a State highway in the northern section of Durham County, about 12 miles from the city of Durham. The three men riding in the automobile were Clyde Ferrell, A. G. Ferguson and Bill Sawyer. Ferguson and Sawyer got out of the automobile, and went into the filling station. Clyde Ferrell, who was the driver of the automobile, remained in his seat. Both Ferguson and Sawyer went into the filling station, and after making some purchases from the proprietor, Isaac Terry, drew their pistols, and pointing them at Terry, ordered him to "stick 'em up." At this time Thaddeus Tilley, the deceased, and James Terry, the ten-year-old son of Isaac Terry, were in the filling station. When Ferguson and Sawyer pointed their pistols at him, Isaac Terry ran behind a counter, to a door opening into a small room adjoining the filling station, and got his pistol and a gun. He pointed his pistol, through a crack in the door, at the two men in the filling station. They darted to the door at the entrance to the filling station. A shot was then fired from outside the filling station, and thereupon Isaac Terry went to a window in the filling station, and fired at the fleeing automobile with his gun. Ferguson and Sawyer, after they ran from the filling station, got into the automobile, and were driven away rapidly by the defendant, Clyde Ferrell. The next day Clyde Ferrell, A. G. Ferguson and Bill Sawyer were arrested in the city of Durham. There was evidence tending to show that the defendant, Clyde Ferrell, A. G. Ferguson and Bill Sawyer were well acquainted with each other, that they had stolen a Ford sedan which they found on a street in the city of Durham, a few nights before the homicide, and that they had committed several robberies while riding about the country in a Ford sedan. All the evidence showed that the defendant, Clyde Ferrell, was driving the automobile at the time these robberies were committed. A. G. Ferguson and Bill Sawyer were riding in the automobile. Neither of them was driving it.

Evidence introduced by the defendant, Clyde Ferrell, tended to show, and if believed by the jury, did show that he was not in the automobile at the time of the homicide, but was at his boarding-house in the city of Durham. There was also evidence tending to show that the shot which struck and killed the deceased was not fired from the automobile which was standing in front of the filling station at the time of the homicide.

The death of the deceased was the result of a wound on his head inflicted by a shot gun. There was no evidence tending to show that A. G. Ferguson or Bill Sawyer fired his pistol inside the filling station, or that Isaac Terry fired his shot gun until he went to the window, and there fired at the fleeing automobile. All the evidence shows that the deceased, Thaddeus Tilley, was shot and killed while he was in the filling station, and before Isaac Terry fired his gun through the window.

The evidence was properly submitted to the jury. The contention of the defendant that there was error in the refusal of his motion at the close of all the evidence for judgment dismissing the action, cannot be sustained.

None of the defendant's numerous exceptions to rulings of the trial court upon his objections to the admission or rejection of evidence at the trial can be sustained. The evidence tending to show that the defendant was present at, and, with A. G. Ferguson and Bill Sawyer, participated in the commission of robberies prior to the homicide was not only relevant, but was also competent, as tending to identify the defendant as the man who was driving the Ford sedan when it stopped in front of the filling station, and who was sitting in the sedan at the time the fatal shot was fired from outside the filling station, as contended by the State. This evidence was competent also as tending to show that the third man in the party which stopped in front of the filling station knew the unlawful purpose of A. G. Ferguson and Bill Sawyer when they got out of the automobile and went into the filling station. The evidence comes within the exceptions to rule of law which excludes evidence of the commission by the defendant in a criminal action of crimes other than for which he is on trial. *S. v. Griffith,* 185 N. C., 756, 117 S. E., 586; *S. v. McCall,* 131 N. C., 798, 42 S. E., 894; *S. v. Frazier,* 118 N. C., 1257, 24 S. E., 520. In *S. v. Frazier,* it is said: "This Court in *S. v. Jeffries,* 117 N. C., 727, said: 'There are some few exceptions to the almost universal rule of law that evidence of a distinct substantive offense cannot be admitted in support of another offense.' The exceptions to the rule are to be found in those cases in which testimony concerning independent offenses has been admitted because of the necessity of proving the *quo animo,* or the guilty knowledge of the defendant and also for purposes of identification of the defendant."

None of the defendant's numerous exceptions to the charge of the court to the jury can be sustained. The charge was full, clear, and correctly applied the law to the facts as the evidence, both for the State and for the defendant, respectively, tended to show. All the evidence showed that the homicide, if committed by the man who sat in the automobile parked in front of the filling station, was murder in the first degree. There was no evidence tending to show that the homicide, if unlawful, was murder in the second degree or manslaughter. For this reason C. S., 4640, was not applicable, and there was no error in the failure of the court to instruct the jury that they could return a verdict of guilty of murder in the second degree or manslaughter. *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402.

There was no error in the trial of this action in the Superior Court. The judgment is affirmed.

No error.

JAMES CURLEE, ADMINISTRATOR OF JOHN CURLEE, DECEASED, v. DUKE POWER COMPANY, LEE WRIGHT, AND JOHN WRIGHT ET AL.

(Filed 10 January, 1934.)

Death B a—Provision that action for wrongful death must be brought within one year is condition annexed to the cause of action.

The right of action to recover for wrongful death is conferred solely by statute, C. S., 160, and the provision therein that the action must be brought within one year from the date of death is a condition annexed to the cause of action and must be strictly observed, and allegations that defendants conspired together to prevent the fact of death being known and that plaintiff administrator was not appointed until several years after intestate's death when the fact of his death was discovered, is not sufficient to overrule defendants' motion of nonsuit based on the fact that the complaint showed that the action was not brought within the time limit prescribed.

APPEAL by plaintiff from *Sink, J.,* at March Term, 1933, of FORSYTH. Affirmed.

This is an action for actionable negligence, brought by plaintiff against the defendant, Duke Power Company, and others. The plaintiff in the complaint alleges that his intestate was killed by the negligence of defendant, Duke Power Company, in July, 1926. The complaint also charges a conspiracy on the part of the Duke Power Company, the physician and undertaker to suppress the fact of his intestate's death to avoid liability. That the death of plaintiff's intestate was not discovered by his relatives until the latter part of 1931. "That, as plaintiff is informed and believes, all of the defendants, with full knowledge of the fact that John Curlee suffered death by reason of the negligence of the defendant, Duke Power Company, entered into a scheme or conspiracy to suppress the facts regarding John Curlee's death and to withhold such facts from his relatives, said scheme or conspiracy being formed for the purpose of preventing a suit to recover damages for the wrongful death of plaintiff's intestate and in that manner to defeat the legal rights of the estate of John Curlee; that in furtherance of such scheme or conspiracy the defendant, Dr. H. H. Newman, failed to file a death certificate with the register of deeds of Rowan County, North Carolina, and failed to make a report as acting coroner to the clerk of the Superior Court of the said county as required by law; that the defendants, Wright and Son, failed to make a record of the death and burial of the said John Curlee; that all of the defendants withheld knowledge of the facts from the press, and that none of the defendants made any attempt whatever to notify John Curlee's relatives of his death."

The plaintiff further alleges in the complaint that on account of the above facts, the plaintiff and other relatives of deceased did not know of such wrongful death and were unable to find out about it by the exercise of reasonable diligence. It is further alleged that the relatives of the deceased lived at Wadesboro, N. C.

The record discloses that Lee Wright and John Wright do not compose the firm of Wright and Son, but that Geo. W. Wright is the sole owner of the Wright Undertaking establishment in Salisbury, N. C. He was thereafter made a party defendant.

Plaintiff duly qualified as administrator of the estate of John Curlee, deceased, on 16 February, 1932. The summons in this action was issued on 4 January, 1933.

The defendant, Duke Power Company demurred to the complaint, as follows: "That this court is without jurisdiction in the premises for that it appears from the plaintiff's complaint that John Curlee met his death in the spring or summer of the year 1926, more than one year prior to the institution of this action, and that section 160 of the Consolidated Statutes, granting recovery for death by wrongful act, prescribes that the action must be brought within one year from death and that such requirement is jurisdictional."

The defendant in its brief says: "While the allegations set out in the plaintiff's complaint and amended complaint must be taken as true for the purpose of this appeal, it is only fair to point out to the court that these allegations would be denied had the defendants filed answer."

The action against the defendants Geo. W. Wright and Dr. H. H. Newman has been removed to Rowan County, N. C., and abides the decision in this case.

The judgment in the court below is as follows: "This cause coming on to be heard and being heard at 13 March Term, 1933, of the Superior Court of Forsyth County, before his Honor, H. Hoyle Sink, judge presiding, upon the plaintiff's complaint and amended complaint and upon the demurrer interposed by the defendant, Duke Power Company, to the plaintiff's complaint and amended complaint, and after arguments of counsel, the court being of the opinion that the demurrer interposed by the Duke Power Company should be sustained; now, therefore, it is ordered, adjudged and decreed that the demurrer interposed by Duke Power Company be and the same is hereby sustained and the plaintiff's action is hereby dismissed as to the Duke Power Company."

The plaintiff excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

E. M. Whitman for plaintiff.
Manly, Hendren & Womble for defendants.

CLARKSON, J. We see no error in the ruling of the court below sustaining the demurrer. C. S., 160, is as follows: "When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors, or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy. In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules, as dying declarations of the deceased in criminal actions for homicide are now received in evidence." Public Laws, 1933, chap. 113, amends this section by allowing burial expenses. The General Assembly, the legislative branch of the government, enacts the law subject to constitutional limitations. It is our sole duty to construe the law as written. The law fixes one year in which an action can be brought for death by wrongful act, neglect or default of another.

At common law a civil action could not be brought for the wrongful death of a human being. In 1846 an act was passed by the English Parliament known as Lord Campbell's Act (9 and 10 Vict. C., 93), which made such action permissible. The above statute in this State is patterned after the Lord Campbell Act.

In *Neely v. Minus,* 196 N. C., 345 (347), it is said: "Our decisions are to the effect that the provisions of law that a suit for wrongful death must be brought within one year, is a condition annexed and must be proved by the plaintiff to make out a cause of action, and is not required to be pleaded as a statute of limitation."

A construction of this act, by this Court citing numerous authorities, is exhaustively set forth in *Tieffenbrun v. Flannery,* 198 N. C., 397 (404), it is there said: "All statutes of limitations are essentially time clocks, and while C. S., 160, has been construed as a condition annexed to the cause of action, it is also a time limit to the procedure. At all events, it is legislative declaration of the policy of this State, providing in express and mandatory language that no action for wrongful death shall be asserted in the courts of this State after the expiration of one year from the time of death."

The decisions of this State are to the effect that this provision requiring suit to be brought within one year after the death must be strictly complied with. No explanation as to why the action was not brought within such time can avail. The fact that no administrator was appointed does not vary the rule. *Taylor v. Iron Co.,* 94 N. C., 525 (526); *Best v. Kinston,* 106 N. C., 205.

The allegations in plaintiff's complaint we do not think sufficient to sustain an action under C. S., 160. The action, to say the least, is novel and we cannot stretch the statute to give plaintiff a cause of action under the facts set forth in the complaint. The statute requires the action "to be brought within one year after such death." In the present case it is some six years, and the charge of conspiracy as alleged in the complaint we do not think sufficient to toll or broaden the statute.

It must be borne in mind that this is an action brought by plaintiff, under C. S., 160. *Taylor v. Iron Co., supra,* a case written by *Merrimon, J.,* is decisive of this controversy. Speaking to the subject in that case, at p. 526-7, it is said: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it, must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, *but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun.*" (Italics ours.) For the reasons given, the judgment of the court below is

Affirmed.

FEDERAL RESERVE BANK OF RICHMOND v. J. A. JONES, TRADING AS JONES & GENTRY.

(Filed 10 January, 1934.)

1. **Jury C a—Where parties admit facts sufficient to support judgment they waive right to trial by jury.**

   Where after the jury has been empanelled the parties to an action on a note admit facts sufficient to support a judgment determining the rights of the parties under the law applicable to such facts, the refusal of the court to submit issues to the jury will be upheld. C. S., 568.

2. **Usury A b: Bills and Notes C e—Holder in due course may recover principal of note although payee withheld part thereof to avoid usury law.**

   The charge of usury on a negotiable note does not render the note void as to the principal thereof but only the promise to pay usurious interest is void, and interest thereon is forfeited in an action on the note brought by the payee or a holder in due course, but where the payee withholds from the borrower a part of the face amount of the note, the same being a device to evade the usury laws, the borrower is entitled in equity to have the note credited with the amount so withheld upon the maturity of the note as against the payee, C. S., 2306, but as against a holder in due course he may not enforce such equity, C. S., 3038, and the holder in due course is entitled to recover the principal of the note with interest thereon from the date of judgment.

APPEAL by defendant from *Harris, J.,* at April Special Term, 1933, of FORSYTH. Affirmed.

This is an action to recover on a note for $7,800, which was executed by the defendant, J. A. Jones, trading as Jones and Gentry, and payable to the order of the Peoples' National Bank, at Winston-Salem, N. C. The note is dated 6 June, 1931, and was due and payable on 6 July, 1931. This action was begun on 5 March, 1932, and was tried in the Forsyth County Court, at the January Term, 1933.

It is alleged in the complaint that prior to the maturity of said note, the Peoples' National Bank endorsed and delivered the same, for value, to the plaintiff, Federal Reserve Bank of Richmond. This allegation is denied in the answer.

It is further alleged in the complaint that the plaintiff is now the owner and holder in due course of said note; that the defendant has not paid the said note, or any part thereof, except the sum of $69.54, which has been duly credited on the note; and that there is now due on said note the sum of $7,730.46, with interest from 6 July, 1931. In his answer, the defendant admits that he has not paid said note or any part thereof, except the sum of $69.54; he denied, however, that there is now due on said note the sum of $7,730.46, with interest from 6 July, 1931. He also denies that plaintiff is the holder in due course of said note.

In his further answer to the complaint, the defendant alleges that at the date of the execution of said note, the Peoples' National Bank, knowingly took, received, reserved and charged interest on said note at a rate in excess of six per cent per annum; that the said Peoples' National Bank loaned to the defendant, on said note, only the sum of $5,800, and withheld from him the sum of $2,000, which was not paid to him, or held by said bank subject to his check; and that by this device, the defendant was required to pay and did pay to said Peoples' National Bank interest on the money loaned to him at a rate in excess of six per cent per annum. The defendant prays judgment that plaintiff recover in this action only the amount received by him from the Peoples' National Bank, to wit: the sum of $5,800, less the sum of $69.54, without interest.

At the trial in the Forsyth County Court, after the jury had been empanelled to try the issues raised by the pleadings, it was admitted by the parties, that the plaintiff, Federal Reserve Bank of Richmond, is the owner and holder in due course of the note sued on in this action; that at the date of the execution of said note, the payee, the Peoples' National Bank, knowingly took, received, reserved and charged interest thereon at a rate in excess of six per cent per annum; and that the said Peoples' National Bank advanced to the defendant on said note only the sum of $5,800, and withheld from him the sum of $2,000, which was not paid to the defendant, or held by said bank subject to his check.

Because of these admissions, the court did not submit issues to the jury. On the facts admitted, judgment was rendered that plaintiff recover of the defendant the sum of $7,730.46, with interest from 4 February, 1933, and the costs of the action. From this judgment, the defendant appealed to the Superior Court of Forsyth County. At the hearing of this appeal, the judgment was affirmed, and the defendant appealed to the Supreme Court.

John J. Ingle and M. G. Wallace for plaintiff.
Joe W. Johnson and S. E. Hall for defendant.

CONNOR, J. There was no error at the trial of this action in the Forsyth County Court in the failure of the judge of said court to submit issues to the jury. The admissions made by the parties, after the jury was empanelled to try the issues raised by the pleadings dispensed with the necessity of submitting issues to the jury. The facts admitted were sufficient to support a judgment in the action, determining the rights of the parties under the law applicable to these facts. Defendant's exceptions with respect to the issues were properly overruled by the Superior Court. C. S., 568.

Under the law in this State, a note executed and delivered as evidence of the promise of the maker to pay to the payee or his order a sum of money which has been loaned by the payee to the maker, is not void, although the payee has, knowingly, taken, received, reserved, or charged interest on the note at a greater rate than six per cent per annum, which is the legal rate in this State; only the promise, in such case, to pay interest is void. C. S., 2306.

For this reason, the payee in an action to recover on a note on which he has charged or received usury, may recover the principal of said note only. In such cases, the entire interest is forfeited. The promise to pay such interest is void and will not be enforced by the court. *Ward v. Sugg,* 113 N. C., 489, 18 S. E., 717.

When a note, on which the payee has charged or received usury, and which is negotiable in form, has been endorsed and delivered by the payee, before maturity, for value, and without notice of any defect in the title of the payee, or of any equity which the maker is entitled to enforce against the payee, to a third person, who thereby becomes a holder in due course of the note, such holder in an action on the note may recover of the maker the principal of the note, but cannot recover interest thereon, for the reason that the law declares the promise to pay interest, in such case, void. The note is void as to interest, whether at the time the action is commenced, it is in the hands of the payee, or in the hands of a holder in due course. This is the declaration of the law. It is so provided by the statute, that the policy of this State which condemns usury both as illegal and as immoral may be enforced by the courts.

In the instant case, the withholding by the Peoples' National Bank from the defendant of the sum of $2,000, although a device adopted by the bank and acquiesced in by the defendant, to evade prima facie the statute, did not render the note void as to the sum withheld, in the hands of either the bank or the plaintiff. The defendant had an equity to have the note credited with said sum, at its maturity. This equity the defendant could have enforced against the bank, but cannot enforce against the plaintiff, who is a holder in due course. C. S., 3038.

There is no error in the judgment of the Superior Court affirming the judgment of the county court.

Affirmed.

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF J. W. EBERT, DECEASED, v. GROVER V. EBERT AND HIS WIFE, PAULINE B. EBERT.

(Filed 10 January, 1934.)

1. **Appeal and Error J e—Error, if any, in trial of issue or in admission of evidence in regard thereto held harmless in view of answer of issue by consent.**

   Where one of the issues between the parties is answered by consent, and as to that issue there is no controversy between the parties, error, if any, in the trial of the issue, or error in the exclusion of evidence tending to impeach the testimony of one of the witnesses in respect to such issue, would not be prejudicial and would not entitle appellants to a new trial.

2. **Trial D a: Bills and Notes H b—Burden of proof on plea of cancellation of note is on defendant, and nonsuit may not be entered in his favor.**

   Where in an action on a note defendants set up the defense that the plaintiff's testator, the payee of the note, canceled and surrendered the note during his lifetime, the burden of the issue is on defendants, and where this is the determinative issue they are not entitled to a granting of their motion as of nonsuit.

3. **New Trial B g—**

   Affidavits in this case held insufficient to support defendants' motion in the trial court for a new trial for newly discovered evidence, and ordinarily such motion is addressed to the sound discretion of the trial court.

APPEAL by both plaintiff and defendants from *Sink, J.*, at June Term, 1933, of FORSYTH. Reversed.

This is an action to recover on a note for $6,500, executed by the defendants and payable to the order of the plaintiff's testator. The consideration for said note was money loaned by said testator to the defendants. In their answer the defendants admitted the execution of the note set out in the complaint, and alleged in defense of the action that plaintiff's testator in his life time canceled and surrendered said note to them.

The action was begun and tried in the Forsyth County Court on issues submitted to the jury and answered as follows:

"1. Did the defendants execute and deliver their promissory note to J. W. Ebert, deceased, as alleged in the complaint? Answer: Yes (by consent).

2. Did J. W. Ebert in his life time tear the signatures from said note with intent to cancel the same? Answer: No.

3. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $6,500, with interest at 4 per cent per annum from 8 October, 1930."

From judgment that plaintiff recover of the defendants the sum of $6,500, with interest at 4 per cent per annum, and the costs of the action, the defendants appealed to the Superior Court of Forsyth County, assigning errors in the trial. At the hearing of this appeal, the judgment was reversed. The action was remanded to the Forsyth County Court for a new trial, and both plaintiffs and defendants appealed to the Supreme Court.

Ratcliff, Hudson & Ferrell for plaintiff.
Parrish & Deal for defendants.

CONNOR, J. The defendants at the trial of this action in the Forsyth County Court admitted the execution of the note set out in the complaint as alleged therein. There was no controversy between the plaintiff and the defendants with respect to the answer to the first issue. This issue was answered by the jury, "Yes (by consent)." For this reason, defendants' assignments of error, on their appeal to the Superior Court, Nos. 1, 2 and 4, with respect to the trial of the first issue, were properly overruled. Conceding without deciding that there were errors with respect to the trial of this issue, as contended by defendants, such errors were manifestly not prejudicial to the defendants, and for that reason did not entitle them to a new trial.

The burden on the second issue, the answer to which is determinative of the action, was on the defendants. For this reason, there was no error in the refusal of the trial court to allow defendants' motion for judgment as of nonsuit at the close of the evidence, or in the instruction of the court to the jury to that effect. *Stockton v. Lenoir,* 201 N. C., 88, 158 S. E., 856.

By their third assignment of error on their appeal to the Superior Court, the defendants presented their contention that there was error in the exclusion of testimony offered by them for the sole purpose of impeaching a witness who had testified for the plaintiff. This testimony was pertinent only to the first issue. For this reason, conceding but not deciding that the exclusion of this testimony was error, such error was not prejudicial to the defendants, and for that reason did not entitle them to a new trial. In the Superior Court, this assignment of error was sustained, and for that reason the judgment of the county court was reversed, and the action remanded for a new trial. In this there was error, as contended by plaintiff on its appeal to this Court. Defendants' assignment of error No. 3, on their appeal to the Superior

Court should have been sustained, and the judgment of the county court should have been affirmed.

The motion of the defendants in the Superior Court for a new trial for newly discovered evidence was properly denied. The affidavits filed by the defendants in support of their motion fail to disclose sufficient grounds for a new trial for newly discovered evidence. Ordinarily this motion is addressed to the discretion of the trial court, and is not subject to review by the appellate court.

An examination of the record in this appeal discloses no error of law in the trial court for which the defendants were entitled to a new trial. The jury found from evidence and under instructions to which there were no objections or exceptions that the payee of the note which defendants executed and delivered to him did not in his life time cancel and surrender the note to them. The defendants failed to sustain the only defense offered by them to plaintiff's recovery in the note. The judgment of the Superior Court reversing the judgment of the county court and remanding the action to said court for a new trial, is

Reversed.

STATE v. J. H. COFER.

(Filed 10 January, 1934.)

Criminal Law G i: L e: Evidence K c—

Whether a witness is an expert and competent to compare disputed handwritings is addressed to the sound discretion of the trial court, and his ruling thereon is not subject to review when supported by evidence.

APPEAL by defendant from *Clement, J.*, at August Term, 1933, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant, a police officer, with bribery, or receiving bribes, in violation of C. S., 4372.

The record discloses that in 1930, Mrs. Fannie J. Richardson Thompson was running one or more hotels, and a lottery, in Winston-Salem. She testified that she paid the defendant, a police officer of said city, ten dollars a week for "protection," that is "he was to call me and let me know if any of my boys was going to be picked up or if they were going to raid my house; in other words, if my name was discussed in police headquarters, or the two Negroes who worked for me, he was to call me and let me know."

It is further in evidence that in June and July, 1930, the defendant wrote the prosecuting witness several notes reminding her that she was slow or behind in her payments. In consequence of these communications, the prosecuting witness testified she sent the defendant the money as requested, either by Jasper Carpenter, a Negro boy who was in her employ, or by a colored boy from police headquarters, who delivered the notes.

To connect the defendant with these notes, the State offered two witnesses, W. P. Rainey and C. H. Whitaker, both in the employ of the Wachovia Bank and Trust Company for many years and who had had much experience in passing upon the genuineness of signatures. The court ruled that said witnesses were experts and competent to express their opinions as such experts. They both testified, in their opinions, comparing the notes with established writings of the defendant, the notes in question were in the handwriting of the accused. The competency of this evidence is the principal point in the case.

The State's evidence was denied by the defendant *in toto.* He proved a good character, and further showed that the general reputation and character of the prosecuting witness was bad.

Verdict: Guilty.

Judgment: Imprisonment in the State's prison, at hard labor, for a period of not less than three nor more than five years.

The defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

Elledge & Wells, Hastings & Booe and Peyton B. Abbott for defendant.

STACY, C. J. According to the established practice in this jurisdiction, whether the witnesses Rainey and Whitaker were experts, competent to compare the disputed writings with established writings of the defendant and express their opinions as to whether the disputed writings were in the handwriting of the accused, was a matter addressed primarily to the sound judgment of the trial court, and is not subject to review on appeal, as the ruling is supported by ample evidence. *S. v. Brewer,* 202 N. C., 187, 162 S. E., 363; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *Liles v. Pickett Mills,* 197 N. C., 772, 150 S. E., 363; *Shaw v. Handle Co.,* 188 N. C., 222, 124 S. E., 325. True, the witnesses may have been somewhat modest in stating their qualifications, nevertheless they did say they could compare the writings and form opinions satisfactory to themselves, and the evidence is quite sufficient to support the ruling of the court in declaring them to be experts.

The remaining exceptions call for no elaboration.

The offense charged against the defendant, and of which he stands convicted, is a serious one. It strikes at the very foundation of government and the ability of organized society to protect itself against the machinations of the gangster and the racketeer. Much has been heard of similar methods in other places and other lands, but it was not thought that they had taken root in our own soil. Mayhap we are only following suit and learning again in this new epoch, that "sufficient unto the day is the evil thereof." Matt. 6:34.

No action or ruling of the trial court has been discovered which we apprehend should be held for reversible error. The verdict and judgment will be upheld.

No error.

S. A. SOUTH v. PAUL SISK AND MOLLIE SISK.

(Filed 10 January, 1934.)

Payment C a—Where parties agree that check should constitute full payment it so operates, although check is not paid by drawee bank.

The acceptance of a check constitutes conditional payment in the absence of an agreement to the contrary, but where a mortgagee accepts a check for the amount of the mortgage debt, marks the note secured by the mortgage "paid," and delivers the note and the canceled mortgage to the mortgagor and cancels the mortgage of record, it is sufficient to establish an agreement that the check should constitute full payment, and the debt is discharged although the check is not paid by the drawee bank upon due presentment because of insolvency, and where the trial court finds such facts, a jury trial being waived, and there is sufficient evidence to support the findings, a judgment in mortgagor's favor will be affirmed.

APPEAL by plaintiff from *Sink, J.,* at April Term, 1933, of ASHE. Affirmed.

When this action was called for trial in the Superior Court, the parties thereto waived a trial by jury, and agreed that the judge should hear the evidence, find the facts therefrom, and render judgment thereon, in accordance with the law applicable to the facts as found by him. The facts found by the judge are as follows:

1. On 31 October, 1931, the defendants were indebted to the plaintiff in the sum of $104.00, as evidenced by a note executed by the defendants, and payable to the order of the plaintiff. The said note was secured by a deed of trust which had been duly recorded in Ashe County.

2. On or about 31 October, 1931, the defendants notified the plaintiff that payment of said note would be made to him by their attorney at his office in West Jefferson, N. C. In consequence of said notice, the

plaintiff went to the office of defendants' attorney on 6 November, 1931, and there accepted from said attorney, in payment of said note, a check for $104.00, which was drawn by the cashier of the Peoples Bank of Somerset County, Princess Anne, Md., on said bank. This check was payable to the order of the plaintiff, and had been delivered by defendants to their attorney for the payment of plaintiff's note. After the plaintiff had accepted said check in payment of his note, he marked the note "Paid," and delivered the same to defendants' attorney. At the request of said attorney, plaintiff entered on the records of Ashe County, a cancellation of the deed of trust by which the said note was secured. The note marked "Paid," and the deed of trust marked "Satisfied and canceled," are now in the possession of the defendants, both having been delivered to them by their attorney.

3. On 6 November, 1931, the plaintiff, having first endorsed the said check, deposited the same to his credit with the First National Bank of West Jefferson, at West Jefferson, N. C. The said bank gave plaintiff credit for the amount of said check, and held said amount subject to plaintiff's checks. Thereafter, in due course, the First National Bank of West Jefferson caused the said check to be duly presented to the People's Bank of Somerset County, Princess Anne, Md., on 13 November, 1931, for payment. The check was not paid, but was returned to the First National Bank of West Jefferson for the reason that the Peoples Bank of Somerset County had closed its doors on 7 November, 1931, and at the date of the presentment of said check was in process of liquidation under the laws of the State of Maryland. After the said check was returned to the First National Bank of West Jefferson, it was charged by said bank to the account of the plaintiff, who had endorsed the same. The said check is now in the possession of the First National Bank of West Jefferson. It has not been delivered or tendered to the defendants by the plaintiff or by any one acting for him.

On the foregoing facts found by him from the evidence, the judge was of opinion, and so found, that the plaintiff accepted the cashier's check delivered to him by defendants' attorney in full payment and discharge of his note, and was therefore not entitled to the relief prayed for in his complaint, to wit: the foreclosure of the deed of trust, by which his note was secured.

From judgment that plaintiff take nothing by his action, and that defendants recover of the plaintiff the costs of the action, the plaintiff appealed to the Supreme Court.

Joseph M. Privette for plaintiff.
W. B. Austin for defendants.

CONNOR, J. The only assignment of error in this appeal is based on plaintiff's exception to the judgment. There is no contention that the evidence at the trial in the Superior Court was not sufficient to sustain the findings of fact made by the judge and set out in the record. The judgment is supported by these facts, and for that reason must be affirmed.

It is well settled as the law in this State and elsewhere that, in the absence of an agreement to the contrary, the delivery of a check by a debtor to his creditor, and the acceptance of the check by the creditor, whether the check is drawn by the debtor, or by a third person, is not a payment of the debt, until and unless the check, upon due presentment, is paid by the drawee bank. In such case the check is only a conditional payment. If it is not paid by the drawee bank, upon presentment, the creditor may recover upon the debt or may sue upon the check, at his option. *Dewey v. Margolis,* 195 N. C., 307, 142 S. E., 22; *Hayworth v. Ins. Co.,* 190 N. C., 757, 130 S. E., 612; *Graham v. Warehouse,* 189 N. C., 533, 127 S. E., 540; *Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3; 48 C. J., 617; 21 R. C. L., 60.

In the instant case there was an agreement by and between plaintiff and defendants, at the time the cashier's check was delivered by defendants' attorney, and accepted by plaintiff, that said check was delivered and accepted in full payment of plaintiff's note executed by the defendants. The plaintiff subsequently endorsed the check, which was payable to his order, and deposited the same in bank to his credit. The check was, therefore, an absolute payment and discharge of the note. 48 C. J., 620. The judgment is

Affirmed.

STATE v. THEODORE COOPER.

(Filed 10 January, 1934.)

Constitutional Law D b: Criminal Law L c—Finding supported by evidence that Negroes were not unlawfully excluded from jury duty is conclusive.

Where upon a motion to quash a bill of indictment on the ground that defendant was a Negro and that the grand jury returning the bill of indictment and the trial jury were composed exclusively of white men and that persons of defendant's race who were qualified to serve as jurors were excluded from the jury list as prepared by the county commissioners, the findings of the trial court, after hearing evidence, that the jurors were drawn, sworn and empanelled in accordance with the laws of this State, C. S., 2314, and that there was no discrimination against persons of defendant's race in making up the jury lists, are conclusive on appeal when supported by sufficient evidence, in the absence of gross abuse.

APPEAL by defendant from *Small, J.,* at May Term, 1933, of DURHAM. No error.

The defendant was tried and convicted of murder in the first degree on an indictment which was returned by the grand jury at May Term, 1933, of Durham Superior Court.

From judgment that he suffer death as prescribed by law (C. S., 4200), by means of electrocution (C. S., 4657), the defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

Moses N. Amis, Amicus Curiæ.

Philip A. Escoffery for defendant.

CONNOR, J. The defendant in this action is a Negro. The trial jury by which he was convicted of murder in the first degree was composed, exclusively, of white men. The indictment on which he was arraigned was returned by a grand jury, which was also composed, exclusively, of white men. The jurors who composed both the trial jury and the grand jury were drawn from the jury box as provided by statute, C. S., 2314. They were drawn, summoned, sworn and empanelled as provided by the laws of this State. There was no contention by the defendant at the trial in the Superior Court, nor is there such contention by him in this Court, that any of the jurors who served in either the trial jury or the grand jury was not duly and legally qualified to serve as a juror on either the trial or the grand jury. At the trial in the Superior Court, the defendant contended that the indictment should be quashed because persons of his race and color, who were qualified to serve as jurors were excluded from the jury list of Durham County, as prepared by the board of commissioners of said county, solely because of their race and color, and that by such exclusion the defendant was deprived of a right guaranteed to him by the Constitution of the United States. This contention was not sustained by the trial court, which denied defendant's motion that the indictment be quashed. Defendant excepted to such denial, and on his appeal to this Court assigns same as error.

Waiving irregularities in the record and defects in the statement of the case on appeal, as certified to this Court, we have considered the only assignment of error on which the defendant relies in this Court. This assignment of error cannot be sustained.

Both the record proper and the statement of the case on appeal show that the defendant offered evidence in the Superior Court in support of his contention, and that this evidence was heard and considered by the judge, who found the facts from the evidence, and on the facts found by him denied defendant's motion that the indictment be quashed. The findings of fact cannot be reviewed by this Court for the reason that there was evidence sufficient to sustain the findings. There was no error in the denial of defendant's motion. *S. v. Daniels,* 134 N. C., 641, 46 S. E., 743; *S. v. Peoples,* 131 N. C., 784, 42 S. E., 814; *Thomas v. Texas,* 212 U. S., 278, 53 L. Ed., 512. In the last cited case it was held that whether or not discrimination against Negroes because of their race or color was practiced by the jury commissioners in the selection of grand jurors or petit jurors is a question of fact, the decision of which by a State court is conclusive on the Supreme Court of the United States, on a writ of error, unless so grossly wrong as to amount to an infraction of the Constitution of the United States.

The evidence set out in the case on appeal leaves no reasonable doubt as to the guilt of the defendant as found by the trial jury. In the absence of any showing in the record or in the case on appeal of an error of law at the trial of the defendant in the Superior Court, the judgment of said court must be affirmed. There is

No error.

STATE v. LOWELL WALL.

(Filed 10 January, 1934.)

1. **Criminal Law E d—**

The announcement of the solicitor, made before entering upon the trial, that the State would not ask for a verdict of more than murder in the second degree, is tantamount to taking a *nolle prosequi* on the charge of first degree murder.

2. **Criminal Law L e—Evidence held not prejudicial in view of withdrawal of charge of first degree murder and proof of killing with deadly weapon.**

Where the evidence shows that defendant killed deceased with a deadly weapon, and the State has taken a *nolle prosequi* on the charge of first degree murder, the admission of testimony tending to show premeditation or malice on the part of defendant cannot be held for reversible error, since the element of premeditation had been withdrawn from the consideration of the jury, and malice and unlawfulness of the homicide were presumed from the intentional killing with a deadly weapon.

3. Homicide G d—

The introduction in evidence of deceased's bloody clothes in a prosecution for homicide cannot be regarded as harmful or erroneous, they being competent proof of a fact in question and being merely stronger proof than oral evidence.

APPEAL by defendant from *Sink, J.,* at May Term, 1933, of ROCKINGHAM.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Sandy Sisk.

Lowell Wall shot and killed Sandy Sisk on Easter Monday, 1933, about 3:00 a.m., while the two were engaged in a duel with pistols at the home of Mrs. Nat Martin, mother-in-law of the deceased. The position of the defendant is that he did not bring on the fight and that he used no more force than was necessary to repel the attack in his own proper self-defense.

Over objection of defendant, Shackie Belton, a witness for the State, was allowed to testify that about a month before the shooting, the defendant told him that on one occasion he could have killed Sisk if he wanted to and claimed he did it in self-defense, that he came mighty near doing it, that Sandy was jealous of him and his wife.

The deceased's bloody clothes were also exhibited to the jury over objection of defendant.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's prison, at hard labor, for a term of not less than fifteen nor more than twenty years.

The defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

Sharp & Sharp and Joe W. Garrett for defendant.

STACY, C. J. The announcement of the solicitor, made before entering upon the trial, that the State would not ask for a verdict of more than murder in the second degree, was tantamount to taking a *nolle prosequi* on the capital charge. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Brigman,* 201 N. C., 793, 161 S. E., 727; *S. v. Spain, ibid.,* 571, 160 S. E., 825; *S. v. Hunt,* 128 N. C., 584, 38 S. E., 473.

In this state of the record, the testimony of the witness, Shackie Belton, even if regarded as indefinite or too remote in point of time, could not be held for reversible error, though admitted over objection of defendant, for the element of premeditation and deliberation, necessary to be shown on the capital charge, had been removed from the case by the action of the solicitor, and both the unlawfulness of the homicide and malice on the part of the defendant were presumed from the intentional killing of the deceased with a deadly weapon. *S. v. Bailey, ante,* 255.

Nor can the introduction in evidence, and exhibition to the jury, of deceased's bloody clothes be regarded as harmful or erroneous. It is not a valid ground of objection to evidence that it tends to prove the fact in question more conclusively when the article to which it refers is exhibited, instead of being left to the description of witnesses. Such objection fails to take into account the difference between the strength of evidence and its competency. *S. v. Westmoreland,* 181 N. C., 590, 107 S. E., 438; *S. v. Vann,* 162 N. C., 534, 77 S. E., 295.

The remaining exceptions discussed on brief present no new question of law or one not heretofore settled by a number of decisions. In no view of the case could the demurrer to the evidence have been sustained; and the charge is free from valid objection. The verdict and judgment will be upheld.

No error.

STATE v. JOHN LEWIS EDWARDS.

(Filed 10 January, 1934.)

1. **Criminal Law J d—Motion for new trial for newly discovered evidence may be made only at trial term or term succeeding affirmance of appeal.**

   A motion for a new trial for newly discovered evidence may be made in the trial court only at the trial term or, in case of appeal, at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court, and where an appeal has been taken, the lower court is without authority to entertain the motion pending the appeal, or if the appeal is abandoned the case is not alive for the hearing of such motion in the lower court.

2. **Criminal Law L e—**

   No appeal lies from a discretionary determination of an application for a new trial on the ground of newly discovered evidence.

MOTION to reinstate appeal, and application for *certiorari.*

Pearson & McCoy for movant and applicant.

STACY, C. J. At the May Criminal Term, 1933, Mecklenburg Superior Court, the movant and applicant herein, John Lewis Edwards, and another were tried upon an indictment charging them with the murder of one J. W. Brown, which resulted in a conviction and sentence of death of the movant, and an acquittal and discharge of his codefendant.

From the sentence of death entered against the defendant, John Lewis Edwards, it is suggested he gave notice of appeal to the Supreme Court, though no entries of appeal appear on said judgment. Nevertheless, as the alleged appeal was not ready for argument, 8 November, 1933, at the call of the docket from the Fourteenth District, the district to which the case belongs, and apparently nothing had been done to bring up the case, upon motion of the Attorney-General the appeal was docketed and dismissed, *ante,* 443, according to the usual course and practice in such cases, opinion filed 22 November, 1933.

The motion of the defendant is not to reinstate the alleged appeal from the trial of the cause upon its merits, heretofore docketed and dismissed, but it appears that after the trial at the May Term, other counsel were employed, and instead of prosecuting the alleged appeal, they lodged a motion in the Superior Court at the August Criminal Term, 1933, for a new trial on the ground of newly discovered evidence. The motion was dismissed or denied, and from the ruling thereon, movant gave notice of appeal to the Supreme Court.

The Superior Court was without authority to entertain this motion at the August Term, hence the attempted appeal from its dismissal or denial, is necessarily nugatory or unavailing.

In the first place, the case was supposed to be pending in the Supreme Court on appeal. If so, during its pendency here, the Superior Court was without power to entertain the motion. *S. v. Casey,* 201 N. C., 185, 159 S. E., 337; *Bledsoe v. Nixon,* 69 N. C., 82; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292.

On the other hand, if the appeal had been abandoned at the time of the motion, the Superior Court was likewise without jurisdiction to entertain it. In *S. v. Casey,* 201 N. C., 620, 161 S. E., 81, it was said, "unless the case is kept alive by appeal, such motion can be entertained only at the trial term."

In other words, when a case is tried in the Superior Court, and no appeal is taken from the judgment rendered therein, motion for new trial on the ground of newly discovered evidence may be entertained only at the trial term. *Lancaster v. Bland,* 168 N. C., 377, 84 S. E., 529; *Stilley v. Planing Mills,* 161 N. C., 517, 77 S. E., 760; *S. v. Bennett,* 93 N. C., 503. But if the case is kept alive by appeal, such motion may be made, as a *dernier ressort,* in the Superior Court at the next succeeding term following affirmance of the judgment on appeal. *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *Allen v. Gooding,* 174 N. C., 271, 93 S. E., 740. See, also, concurring opinion in *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402. These are the only terms—the trial term and the next succeeding term following affirmance of judgment on appeal—at which such motions may be made in the Superior Court. *S. v. Lea,* 203 N. C., 316, 166 S. E., 292. Of course, if duly and seasonably lodged at one of these terms, the actual hearing of the motion may be continued by consent to a later term, but this is not movant's case.

Furthermore, no appeal lies to this Court from a discretionary determination of an application for new trial on the ground of newly discovered evidence. *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *S. v. Moore,* 202 N. C., 841, 163 S. E., 700; *S. v. Griffin,* 202 N. C., 517, 163 S. E., 457; *S. v. Cox,* 202 N. C., 378, 162 S. E., 907; *S. v. Lambert,* 93 N. C., 618; *Carson v. Dellinger,* 90 N. C., 226; *Holmes v. Godwin,* 69 N. C., 467; *Vest v. Cooper,* 68 N. C., 131.

The prisoner's only hope of escaping the pains and penalties of the judgment pronounced against him, now lies with the pardoning power.

Motion to reinstate denied.

Application for *certiorari* denied.

W. M. WEBB, A RESIDENT AND TAXPAYER OF THE TOWN OF MOREHEAD CITY, ON BEHALF OF HIMSELF AND ALL OTHER RESIDENTS AND TAXPAYERS OF THE TOWN OF MOREHEAD CITY, v. THE PORT COMMISSION OF MOREHEAD CITY, A CORPORATION, AND THE MAYOR AND BOARD OF COMMISSIONERS OF THE TOWN OF MOREHEAD CITY.

(Filed 10 January, 1934.)

1. **Statutes A b—Purpose of act determines whether it is special act within meaning of constitutional provision affecting its validity.**

Whether an act of the Legislature is public or private, general or special within the meaning of a constitutional provision affecting its validity for that reason depends upon its purpose and not its classification by the public official charged with the duty of making such classification. C. S., 7659.

2. **Same—Inhibition on Legislature to pass special act affecting charter of corporation applies only to private or business corporations.**

Article VIII, sec. 1, prohibiting the Legislature from creating a corporation by special act, applies to private or business corporations and not to public or *quasi*-public corporations having governmental functions as agencies of the State, and whether a corporation is a private or business corporation within the prohibition is to be determined by the purposes for which it was created.

3. **Same—Port Commission of Morehead City held public corporation and Legislative act creating it held valid.**

The Port Commission of Morehead City, created by chap. 75, Private Laws of 1933, is a public corporation created as an agency of the State to perform the governmental function of providing port facilities for the commerce of the State in the public interest, and not for private gain, and the Legislature is not prohibited from creating such corporation by Art. VIII, sec. 1, nor is the act creating it a special act within the meaning of this section of the Constitution, and the Commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act.

4. **Taxation A e—Bonds of Port Commission of Morehead City are solely its obligation and not obligation of State or its municipalities.**

The Port Commission of Morehead City, created by chap. 75, Private Laws of 1933, is given authority to construct and maintain port facilities, to charge and collect tolls and fees in connection with the use of such facilities, its revenues derived from such tolls and fees being lawfully applicable solely to pay expenses of operating, maintaining and constructing such port facilities, and in order to finance the project, to issue its bonds solely on its own credit, which bonds with interest are to be paid from its operating revenues and are not obligations of the State or the town of Morehead City, or any other municipality of this State.

5. **Taxation B d—Bonds and property of Port Commission of Morehead City are exempt from taxation.**

The legislative provision exempting the property and bonds of the Port Commission of Morehead City from taxation is valid since the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation if sold to and held by an agency of the United States Government, or are held by a purchaser from such Federal agency. Art. V, sec. 3.

6. **Taxation A f—Provisions as to manner of issuance of bonds of Port Commission in certain contingencies held not to affect their validity.**

The provisions in chap. 75, Private Laws of 1933, that the bonds to be issued by the Port Commission of Morehead City, should be sold under the provisions of the Municipal Finance Act with the approval of the Local Government Commission in the event that the bonds were not sold to a Federal agency, do not affect the validity of the bonds which may be issued and sold to the Federal agency, the provisions being applicable only in certain contingencies and being merely a part of the mechanics for the issuance of the bonds.

7. **Taxation A a—Bonds of Port Commission of Morehead City may be issued without vote.**

Chapter 75, Private Laws of 1933, provides that in the event the operating revenues of the Port Commission of Morehead City should be insufficient to pay its operating and maintenance costs and to pay the interest on its bonds and provide a sinking fund for same, the town of Morehead City might levy a tax with the approval of its qualified voters to make up the deficiency: *Held*, a vote of the qualified electors of Morehead City is not necessary to the validity of the bonds proposed to be issued by the Port Commission, and if the contingency should happen and an election called and the tax approved by the qualified electors of the town, such tax would be valid regardless whether it was levied for a necessary expense. Art. VII, sec. 7.

ADAMS and CLARKSON, J.J., concurring.

BROGDEN, J., dissenting.

STACY, C. J., concurs in dissent.

APPEAL by plaintiffs from *Frizzelle, J.,* at Chambers, in the town of Snow Hill, N. C., on 23 September, 1933. From CARTERET. Affirmed.

This is a controversy without action submitted to the Superior Court of Carteret County by the parties thereto, in accordance with the provisions of C. S., 626.

The cause was heard by his Honor, J. Paul Frizzelle, judge holding the courts of the Fifth Judicial District, at his Chambers, in the town of Snow Hill, N. C., on 23 September, 1933, on an agreed statement of facts which is duly verified as required by the statute.

The agreed statements of facts, together with the questions of law in difference between the parties, which arise upon said facts, are substantially as follows:

1. The Port Commission of Morehead City is a corporation created by the General Assembly of North Carolina, by statute duly enacted at its regular Session in 1933. Chapter 75, Private Laws of North Carolina, Session 1933. The members of said commission have been duly appointed, and have duly organized by the election of a chairman, secretary and treasurer, as required by said act. The said commission is now engaged in the performance of its duties as imposed by the act of the General Assembly, and in the exercise of its powers as conferred by said act.

2. Section 2 of said act is as follows: "Sec. 2. The said Port Commission shall have power:

(1) To sue and be sued in the name of the Port Commission; to acquire by purchase and condemnation, and to hold lands for the purpose of constructing, maintaining or operating the terminal or terminals hereinafter referred to; and to make such contracts and to hold such personal property as may be necessary for the exercise of the powers of said Port Commission.

(2) To charge and collect reasonable and adequate wharfage fees and other fees, tolls or dues for the use of such city terminal or terminals, or for the service rendered in the operation thereof.

(3) To develop the port facilities of Morehead City by acquiring by purchase (construction or otherwise), improving, maintaining, and operating a city terminal or terminals for said city, upon the water front of said city, including all necessary wharves, piers, bulkheads,

slips, docks, sheds, warehouses, elevators, and railroad and steamship facilities, and also necessary lands, rights in lands and water rights, to be used and operated for the following purposes, namely: for the landing, loading and unloading of vessels, for the loading and unloading of railroad cars or other carriers, for the interchange or transfer of goods, merchandise or other property between vessels, railroad cars or other carriers, and for the temporary shelter or storage of goods, merchandise or property carried or about to be carried by such vessel, railroad cars or other carriers.

(4) To issue bonds and/or other securities or obligations for the purpose of providing funds for such construction, maintaining and/or operating the said terminal or terminals. Said bonds, if and when so issued, shall be denominated 'Port Commission Bonds of Morehead City.' and shall be issued in such form and denominations and shall mature at such time or times, not exceeding fifty years after their date, and shall bear such rate of interest, not exceeding six per cent per annum, payable either annually or semiannually, as the said Port Commission may determine. The bonds shall be signed by the chairman of said Port Commission Board, and its corporate seal affixed or impressed upon each bond and attested by the secretary to said board. The coupons to be attached to said bonds shall bear the facsimile signature of the chairman officiating at the time of the issuance of said bonds. Such bonds and/or notes issued for the purpose or purposes above set out may be sold at private sale, for not less than par, to the Reconstruction Finance Corporation or other governmental agency, with the approval of the board of commissioners of Morehead City; but if such private sale is not so made to said Reconstruction Finance Corporation or other governmental agency, then the sale shall be made under the provisions of the Municipal Finance Act of the State and with the approval of the Local Government Commission.

Bonds and notes issued under this act shall be exempt from all State, county or municipal taxes or assessments, direct or indirect, general or special, and the interest paid on said bonds or notes shall not be subject to taxation as income, nor shall said bonds or notes, or coupons on said bonds, be subject to taxation when constituting part of the surplus of any bank, trust company or other corporation.

(5) Any resolution or resolutions authorizing any bonds may contain provisions which shall be part of the contract with the holders of the bonds, as to:

(a) Pledging the wharfage fees and other fees, tolls, dues or other revenues to secure the payment of the bonds;

(b) The rates of the tolls to be charged for the use of the facilities of the terminal or terminals, and the use and disposition of the tolls and other revenues;

(c) The setting aside of reserves or sinking funds and the regulation and disposition thereof;

(d) Limitation on the purposes to which the proceeds of sale of any issue of bonds to be issued may be applied;

(e) Limitation on the issuance of additional bonds;

(f) The procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given.

(g) To do all things necessary or convenient to carry out the powers expressly given in this act."

3. The Port Commission of Morehead City has filed with the Public Works Administration, at Washington, D. C., an application for a loan with which to provide funds for acquiring, constructing, maintaining, and/or operating terminal and terminal facilities at Morehead City, and is proposing to issue bonds and/or other securities or obligations for the purpose of procuring said loan. The bonds when so issued are to be denominated "Port Commission Bonds of Morehead City," and are to be issued in such form and denominations, and will mature at such time or times, not exceeding fifty years from their date, and will bear interest at such rate, not exceeding six per cent per annum, as the said Port Commission may determine, with the approval of the Public Works Administration, and not inconsistent with chapter 75, Private Laws of North Carolina, Session 1933. The bonds are to be signed by the chairman of said Port Commission, and shall have affixed thereto or impressed thereon the corporate seal of said commission, attested by its secretary. The coupons to be attached to said bonds will bear the facsimile signature of the chairman of said commission, officiating at the time of the issuance of said bonds. It is proposed that the said commission shall sell said bonds at private sale, for not less than par, to the Public Works Administration or other governmental agency; and that if such sale be not made to such governmental agency, then the sale shall be made under the provisions of the Municipal Finance Act of the State of North Carolina, with the approval of the Local Government Commission of said State.

4. Section 6 of said act is as follows: "Sec. 6. All wharfage fees and other fees, tolls, dues or other revenues derived by the Port Commission from the operation of such terminal or terminals shall be applied to the payment of the cost of operation and administration of said terminal or terminals (including interest on bonds or other evidences of indebtedness issued therefor, and the cost of insurance against loss by injury to persons or property) and the balance to be paid to the treasurer and to be used for the purpose of providing a sinking fund with

which to pay at or before maturity all bonds and/or notes or other evidences of indebtedness incurred for or on behalf of the building, constructing, maintaining and operating said terminal."

5. Section 7 of said act is as follows: "Sec. 7. Whenever the said Port Commission shall determine that such wharfage fees, and other fees, tolls, dues and other revenues will be or are insufficient to pay in any year the cost of operation and administration of said terminal or terminal facilities (including interest on bonds or other evidences of indebtedness issued therefor, and the cost of insurance against loss by injury to persons or property) and sinking fund requirements for such year, it shall certify to the board of commissioners of Morehead City the amount of such anticipated or existing deficiency, and upon receipt of such certificate it shall be the duty of said board of commissioners of Morehead City to cause to be levied on all the taxable property within the territorial limits of said city in the same manner as other city taxes are levied, a special tax in an amount sufficient to meet such deficiency, not exceeding, however, an amount equivalent to ten cents on each one hundred dollars of taxable values for the year or years in which such levy is sought and/or required to be made, and the tax so levied shall be in addition to all other taxes authorized by law to be levied in said municipality; and the authorization for such levy and the levy of such taxes for said special purposes are hereby declared to be levies for necessary purposes, notwithstanding any prohibition in any general or special acts now existing. Any indebtedness incurred by said Port Commission pursuant to this act shall not be taken into consideration in determining the power of the city of Morehead to become further indebted; Provided, however, that the board of commissioners of Morehead City shall not make or cause to be made such tax levy as above provided for until there first shall have been submitted to the qualified voters of said municipality the question of special tax levy for the indicated purpose and a majority of the qualified voters shall have voted in favor of such special levy."

6. The bonds which the Port Commission of Morehead City proposes to issue and sell in order to procure funds to enable said commission to perform the duties imposed upon said commission by the act of the General Assembly, will not be issued in the name of the town of Morehead City, or in the name of the State of North Carolina. Neither the State nor said municipality will be obligated for the payment of said bonds, or of interest on the same. No tax will, or can be levied upon the taxable property within the territorial limits of the town of Morehead City, until such tax has been approved by a majority of the qualified voters of said town at an election to be called by its board of commissioners, in accordance with the provisions and subject to the

limitations of the act of the General Assembly creating the Port Commission of Morehead City.

7. Section 11 of the act is as follows: "Sec. 11. It is hereby declared to be the policy of the State of North Carolina to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation, and that Morehead City, North Carolina, is hereby declared to be a port to be developed in connection with the interior of the State of North Carolina and other states, and it is hereby declared and deemed by the State of North Carolina, necessary and desirable, and in the public interest of the entire State that there shall be established through Morehead City, through connecting water and rail rates in connection with shipping companies, and other transportation companies and in accordance with the provisions of the acts of Congress of the United States, and the laws of North Carolina. The said Port Commission shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation of the said terminal or terminals, and in carrying out the provisions of this act in relation thereto, and shall be required to pay no taxes or assessment upon any of the properties acquired or used by it for such purposes."

8. Chapter 75, Private Laws of North Carolina, Session 1933, was ratified on 22 March, 1933. It has been in full force and effect since the date of its ratification.

The questions of law which arise on the foregoing facts, involve:

"1. The constitutionality of chapter 75, Private Laws of North Carolina, Session 1933.

2. The validity of the bonds which the Port Commission of Morehead City propose to issue under the authority of said act.

3. The issuing authority of said bonds, whether the Port Commission of Morehead City or the town of Morehead City.

4. Whether the bonds are for 'necessary expenses' within section 7, Article VII of the Constitution of North Carolina.

5. Whether an election, to be called and held in the town of Morehead City, at which the majority of the qualified voters of said town shall approve the issuance of said bonds, is required as a condition precedent to the issuance of said bonds.

6. Whether the bonds if issued and sold by the Port Commission of Morehead City will be subject to any debt limit other than as specified in the act.

7. The term and maturities of said bonds as related to the period of usefulness of the project.

8. The authority of the Port Commission of Morehead City to charge fees and tolls for the services rendered by the project, to pledge the revenues thereof, and to limit the issuance of additional bonds.

9. The application of the Local Government Act of North Carolina to the issuance of said bonds and the functioning of the said Port Commission.

10. The application of the Municipal Finance Act to the issuance of said bonds.

11. The constitutionality of the provisions of said act exempting the property and bonds of the Port Commission from any and all taxation."

Upon consideration of the foregoing facts, the court determined the questions of law arising thereon, and ordered and adjudged as follows:

(a) That chapter 75, Private Laws of North Carolina, Session 1933, is in all respects constitutional and a valid enactment.

(b) That the bonds issued and/or to be issued in conformity with the provisions of said act of the General Assembly of North Carolina are/or will be valid obligations of the Port Commission of Morehead City.

(c) That the issuing authority under the aforesaid act of the General Assembly of North Carolina is the Port Commission of Morehead City.

(d) That the bonds of said Port Commission of Morehead City provided for in said act as, if and when issued constitute valid obligations for necessary expenses within the expressed terms of the act creating said Port Commission, and by reason of the legislative declaration as to the location and condition of the property affected with the governmental functions imposed upon the said Port Commission form a necessary expense within a proper construction of Article VII, section 7, of the Constitution of North Carolina.

(e) That no election is necessary or required as a condition precedent to the issuance of the said bonds proposed to be issued by the said Port Commission of Morehead City.

(f) That said bonds are subject to no debt limitation other than as specified in the act authorizing the issuance of the same.

(g) That the term and maturities of the bonds proposed to be issued by said Port Commission are shorter in term of duration than the life of the utility of the project, as said maturities are limited to twenty-five years and the period of usefulness of the project by the issuance of said bonds is assured an increasing usefulness limited only to the life of the community in which the project is intended to function.

(h) That the act of the General Assembly of North Carolina creating the Port Commission of Morehead City, constitutional in all its provisions, bestows ample authority on said Port Commission to charge fees and tolls for services rendered, to pledge the revenues derived from said project, and to limit the issuance of additional bonds.

(i) That the provisions of the Local Government Act are not applicable in any respect unless it is proposed that the said bonds of the Port Commission of Morehead City shall be sold to others than the Reconstruction Finance Corporation, Public Works Administration, or other governmental agency, in which case the sale shall be made with the approval of the Local Government Commission of North Carolina.

(j) That the Municipal Finance Act of North Carolina has no application to the issuance of bonds by the Port Commission of Morehead City or to the incurring of any other form of obligation by the said Port Commission, nor to the sale of such bonds unless said bonds are sold to some person other than the Reconstruction Finance Corporation, Public Works Administration or other governmental agency.

(k) That the exemption of the property of said Port Commission of Morehead City and of its bonds from taxation, is constitutional and said exemption is expressly provided in the act of the General Assembly of North Carolina, creating said commission, which expressly provides that the said Port Commission 'shall be regarded as performing an essential governmental function in undertaking the construction, maintenance, and operation of the said terminal or terminals . . . and shall be required to pay no taxes or assessment upon any of the properties acquired or used by it for such purposes' and 'that bonds and notes issued under this act shall be exempt from all taxes.'"

The plaintiffs excepted to the foregoing judgment and to every part thereof, and appealed to the Supreme Court.

Alvah L. Hamilton and Julius F. Duncan for plaintiffs.
Luther Hamilton, W. H. Hoyt and L. R. Varser for defendants.

CONNOR, J. It is contended on behalf of the plaintiffs, on their appeal to this Court, that chapter 75, Private Laws of North Carolina, Session 1933, is unconstitutional and void, because by its enactment the General Assembly has undertaken to create a corporation by a special act in violation of the prohibition of section 1 of Article VIII of the Constitution of North Carolina. If this contention is sustained, the judgment of the Superior Court is erroneous in all respects, and must be reversed. If, however, the act is constitutional and valid, the Port Commission of Morehead City is a corporation duly created and organized under the laws of this State, with such powers as are conferred upon said corporation by the General Assembly in the exercise of its valid legislative power. In that case, the validity of these powers as set out in the act, is presented by the plaintiffs' exception to the judgment, and must be determined by this Court in disposing of this appeal. If some of these powers are valid, and others invalid, because of constitutional prohibitions, the judgment must be modified and affirmed. If all the essential powers conferred by the act on the Port Commission of Morehead City, as a corporation, are valid, the judgment must be affirmed. Thus the primary question involved in this appeal is whether the act of the General Assembly creating the corporation is unconstitutional and void, as contended on behalf of the plaintiffs.

Section 1 of Article VIII of the Constitution of North Carolina, is as follows:

"Section 1. Corporations under General Laws. No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation."

Whether or not chapter 75, Private Laws of North Carolina, Session 1933, is a special act within the meaning of section 1 of Article VIII of the Constitution, is to be determined not by its form or by its publication as a private act, but by its purpose as disclosed by its language, and by what in the ordinary course of things must necessarily be its operation and effect. *R. R. v. Cherokee County,* 177 N. C., 86, 97 S. E., 758; *Hancock v. R. R.,* 124 N. C., 222, 32 S. E., 679. Whether a statute is public or private, general or special, within the meaning of a constitutional provision affecting its validity for that reason, depends upon its purpose as shown by its contents, and not upon the judgment of a public official, who has directed its publication in the performance of an administrative duty imposed upon him by statute. C. S., 7659.

And so, whether or not the corporation created by chapter 75, Private Laws of North Carolina, Session 1933, and known as the Port Commission of Morehead City, is such a corporation as the General Assembly is prohibited from creating by section 1 of Article VIII of the Constitution, is to be determined by the purposes for which said corporation was created, and the powers which are conferred upon said corporation by the act, and not by a strict and literal construction of the word as used in said section. It has been uniformly held by this Court since section 1 of Article VIII was ratified as an amendment to the Constitution, that the prohibition contained in the section refers to private or business corporations, and not to public or *quasi*-public corporations created by the General Assembly, as governmental agencies with power to perform governmental functions. *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624. In that case it is said: "It has been held that this section applies only to private or business corporations and not to those of a public or *quasi*-public nature, such as cities, towns, and counties. *Kornegay v. Goldsboro,* 180 N. C., 441, 105 S. E., 187. A municipality furnishing water or light renders service for a public purpose, and the fact that the water or service is furnished for individual consumption or the use of the inhabitants does not detract from the public service. Private purposes may be served incidentally, but this does not destroy the public character of the corporation or municipality. 3 Dillon (5 ed.), sec. 1300." The suggestion to this effect was first made in *Board of Education v. Comrs.,* 174 N. C., 47, 93 S. E., 383, and was subsequently approved in *Mills v. Comrs.,* 175 N. C., 215, 93 S. E., 481. It may be that in neither of these cases was the question directly presented. The question was, however, directly presented and decided by this Court in *Kornegay v. Goldsboro,* 180 N. C., 441, 105 S. E., 187, and in *Dickson v. Brewer,* 180 N. C., 403, 104 S. E., 887. In *Kornegay v. Goldsboro, supra,* it was held that section 1 of Article VIII of the Constitution must be construed in connection with sections 2 and 3 of said article. Applying this principle, it was held that the word "corporation," used in section 1 of Article VIII, must be construed as meaning a corporation created for private or business purposes.

An examination of all the provisions of chapter 75, Private Laws of North Carolina, Session 1933, discloses that the corporation created by said act, to be known as the Port Commission of Morehead City, is not a private or business corporation, but is a public corporation, created by the General Assembly as an agency of the State to perform a well recognized governmental function, to wit: to provide facilities for the transportation of goods, wares and merchandise both into and out of the State by means of carriers over land and water. These facilities will not be constructed, maintained or operated, under the terms of the act, for private gain, but solely in the public interest. Revenues derived from the operation of the facilities will be devoted exclusively to the payment of the expense of their operation and maintenance, and of the interest on the bonds, and of the bonds, at their maturity, which the corporation is authorized to issue to procure funds to defray the expense of constructing, maintaining and operating the said facilities. For these reasons, the statute is not a special act within the meaning of section 1 of Article VIII of the Constitution of this State, nor is the Port Commission of Morehead City such a corporation as the General Assembly of this State is prohibited from creating by said section.

The contention that chapter 75, Private Laws of North Carolina, Session 1933, is unconstitutional and void, because its enactment was in violation of section 1 of Article VIII of the Constitution of North Carolina, is not sustained. There was no error in the judgment of the Superior Court that said act is constitutional and valid. Its enactment was not in violation of any prohibition of the Constitution of this State.

The Port Commission of Morehead City is a corporation duly created by the General Assembly of this State, in the valid exercise of its legislative power. As such corporation, the said commission has the power to construct, maintain and operate the facilities described in the act, and to charge, and collect fees and tolls from those who avail themselves of the service provided by the said facilities. The revenues derived from the operation of said facilities must be applied solely and exclusively to the payment of the expenses incurred by the commission in operating, maintaining and constructing the said facilities. No part of said revenues can be lawfully applied or appropriated to any other purpose. Under the terms of the act, none of said revenues will be paid to the State of North Carolina, to the town of Morehead City, or to any municipality of the State of North Carolina, unless, of course, the State or some of its municipalities shall become holders of the bonds, which may be issued by the said Port Commission.

The Port Commission of Morehead City, as a corporation duly created and organized under the laws of this State, has the power, expressly conferred upon the corporation, to issue and sell its bonds for the purpose of procuring funds with which to pay for the construction, maintenance and operation of the facilities which the said commission is authorized to construct, maintain and operate at Morehead City. These bonds will not be obligations of the State of North Carolina, of the town of Morehead City, or of any other municipality of this State.

The credit of neither the State, nor of the town of Morehead City, nor of any other municipality of this State, is pledged for the payment of said bonds, or of the interest on the said bonds. The bonds may be issued only on the credit of the Port Commission of Morehead City, as a corporation. The interest on the bonds, and the bonds, as they shall mature, will be paid only out of revenues derived from the operation of the facilities which the Port Commission is authorized to construct, maintain and operate at Morehead City. The provision in the act by which the Port Commission was created that its property and the bonds that may be issued and sold as authorized by the act shall be exempt from taxation by the State, or any of its political subdivisions, is valid. The General Assembly has the power to so provide, for the reason that the property of the Port Commission will be held, and the bonds will be issued solely for public purposes. Whatever doubt there may be as to the validity of this provision, by reason of section 3 of Article V of the Constitution of this State, must be, under well settled principles of constitutional construction, resolved in favor of its validity. Certainly, if the bonds are sold to an agency of the United States Government, as contemplated by the act, the provision is valid so long as the bonds are held by such agency, or by any person, firm or corporation holding the same by purchase from such agency. The provisions of the act, with reference to the board of commissioners of the town of Morehead City, the Municipal Finance Act of North Carolina, or the Local Government Commission of this State, do not affect the validity of bonds which may be issued and sold by the Port Commission to an agency of the United States Government. These provisions, applicable only in certain contingencies, are merely a part of the mechanics provided for the issuance of the bonds.

The provisions of the act by which the Port Commission of Morehead City was created, relative to the calling and holding of an election in the town of Morehead City, to determine whether a majority of the qualified voters of said town approve the levying of a tax by the board of commissioners of said town for the purpose of raising money to aid the said Port Commission in the performance of its duties, do not affect the validity of the bonds which the Port Commission may issue under the power conferred upon the said commission by the act. Such an election is not a condition precedent to the issuance of the bonds. The election may be called and held only in the contingency provided for by the act. If such contingency shall happen, and the election shall be called and held, and a majority of the qualified voters of the town shall approve the levying of the tax, as authorized by the act, the tax will be valid, and may be lawfully levied and collected, without regard to whether the tax is for a necessary purpose within the meaning of section 7 of Article VII of the Constitution of North Carolina. Such tax will be for a public purpose. *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597.

Some of the specific questions in difference between the parties to the controversy and submitted to the court for determination are not necessarily involved in the larger questions presented. There is no error in the judgment to the effect:

(1) That chapter 75, Private Laws of North Carolina, Session 1933, is in all respects a valid and constitutional enactment;

(2) That the Port Commission of Morehead City is a corporation, duly created and duly organized under the provisions of the act;

(3) That the Port Commission of Morehead City, as a corporation created by the General Assembly, for a public purpose, may lawfully

exercise all the powers conferred upon the said commission by the General Assembly in order that said commission may perform its duties as prescribed by the act;

(4) That the bonds which the Port Commission of Morehead City proposes to issue and sell, under the authority conferred upon said commission by the act, will be valid obligations of said commission, and if sold to an agency of the United States Government, will be exempt from taxation, so long as held by such agency, or by any person, firm or corporation holding the same as a purchaser or purchaser from such agency.

(5) That if an election shall be called and held by the board of commissioners of the town of Morehead City, and the levying of a tax as authorized by the act shall be approved by a majority of the qualified voters of said town at said election, such tax will be valid, and may be lawfully levied and collected.

In arriving at the conclusion that the judgment of the Superior Court should be affirmed, we have not been unmindful of contentions made by the counsel for the appellants in their arguments in this Court to the contrary, nor have we been indifferent to well settled principles of constitutional construction. The arguments were forceful and persuasive, but we think not conclusive. The construction of the act has not been, we think, in violation of these principles. It is true that we have not been aided by decided cases or precedents. The questions presented are novel, and in many respects of first impression. We have been influenced largely in our conclusion by the language used by the General Assembly in section 11 of the act. It is there declared that "the Port Commission shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation of the said terminal or terminals, and in carrying out the provisions of this act in relation thereto, and shall be required to pay no taxes or assessment upon any of the properties acquired or used by it for such purposes." It is further declared in said section that it is "the policy of the State of North Carolina to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States and to foster and preserve in full vigor both rail and water transportation, and that Morehead City, North Carolina, is hereby declared to be a port to be developed in connection with the interior of the State of North Carolina."

Chapter 75, Private Laws of North Carolina, Session 1933, was enacted in furtherance of the declared policy of the State, and in all its provisions is reasonably adequate to that end. The judgment is

Affirmed.

ADAMS, J., concurring: By a process of reasoning divergent in some particulars from that which is indicated in the principal opinion as written by *Justice Connor,* I am convinced that the legislative act creating the Port Commission of Morehead City (Private Laws, 1933, chap. 75), intended as it was to promote and preserve the interests of the State, is not within the inhibitive clause of Article VIII, section 1, of the Constitution, and that the result announced in the opinion of the Court is correct. I therefore concur in the result therein stated.

CLARKSON, J., concurring: I concur in the opinion of *Mr. Justice Connor.*

A unanimous Court made the following order: "This cause is set down for oral argument on Wednesday, 15 November, 1933, at ten o'clock, counsel are directed to discuss the applicability of Article VIII, section 1, of the Constitution of North Carolina."

So, it may be conceded that the only serious question involved on this appeal is whether or not chapter 75, Private Laws of 1933, is constitutional.

Article VIII, section 1, is as follows: "No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed, and the General Assembly may at any time by special act repeal the charter of any corporation."

Judge Frizzelle, in the court below held the act constitutional.

In *Sutton v. Phillips,* 116 N. C., at p. 504, speaking to the question of declaring an act unconstitutional, this Court said: "While the courts have the power; and it is their duty, in proper cases to declare an act of the Legislature unconstitutional it is a well recognized principle that the courts will not declare that this coördinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. *If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.* (Italics ours.) . . . (p. 505) It cannot be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the General Assembly." *Hinton v. State Treasurer,* 193 N. C., 496 (499).

It has often been decided by this Court that the purpose and spirit of an act must be considered in its construction and its obvious intent ascertained and respected. *Guano Co. v. Walston,* 187 N. C., 667. Spirit and reason of statute should prevail over its letter. *Carr v. Little,* 188 N. C., 100.

The spirit and reason of the statute, I think, creates the Morehead City Port Commission—an agency of the State—and does not come within the inhibitions of Art. VIII, sec. 1, and is not a private or business corporation, and is therefore constitutional. The distinction between *public* and *private* corporations is clearly stated in a textbook, unexcelled. 1 Thompson on Corp., 3d ed., sec. 24 (p. 29-30), in part is as follows: "Another general division of lay corporations is into public and private. This distinction is practical, but not always clear. While it is not within the scope of this work, as observed, to treat of public corporations, yet it is important to show the dividing line between public and private corporations. The importance of the distinction between the two is emphasized by the fact that many principles and rules which apply to one have no application to the other. (1) Thus a public corporation is subject to legislative control without any reference to the consent of the persons who control it. (2) A public corporation does not originate in contract, while a private corporation does, and therefore the instrument creating the latter cannot be altered or amended by the law-making power, without the consent of the members who compose it, unless such power is expressly reserved. Public corporations are mere creatures or instrumentalities of the State and are subject to governmental visitation and control. So, the property of a public corporation is not taxable, while that of a private corporation is. (3) A public corporation is, generally, political in its nature, and its object is to carry out a scheme of government, while a private corporation has none of these characteristics. Public corporations, as a rule, are not liable either for the negligence or torts of their officers. Perhaps the only exception to this rule is in the case of counties, cities and towns, and then only in a limited sense, and in regard to matters involving the exercise of ministerial acts and not governmental functions. The right to create these corporations is vested exclusively in the legislature, subject only to constitutional limitations."

The above distinction between public and private corporations is supported by numerous authorities and by the decisions of this State.

It is a matter of common knowledge that in the summer of 1916 a great freshet swept away the railroad bridges in the western part of the State. The amendments to the Const., Art. II, sec. 29, and Art. VIII, sec. 1, *supra,* went into effect 10 January, 1917. In *Mills v. Comrs.,* 175 N. C., 215 (216), it is said by *Hoke, J.:* "On full presentation of facts, the controversy submitted was whether plaintiffs, citizen residents and taxpayers of said county, were entitled to an injunction against defendant board, restraining them from the proposed issuance and sale of bonds of the county to the amount of $40,000, pursuant to chapter 575, Public-Local Laws of the General Assembly of 1917, ratified 5 March, 1917, for the purpose of rebuilding bridges over the Catawba River between Iredell and Catawba counties in conjunction with the authorities of the latter county, the determinative question being whether said act was in violation of the recent constitutional amendments prohibiting certain local and special and private legislation on the subject, contained chiefly in the Constitution, Art. II, sec. 29, etc. . . . (p. 217.) Shortly after these amendments were ratified, a case was presented involving the question whether, in view of these provisions 'An act authorizing the commissioners of McDowell County to issue bonds for road purposes in North Cove Township, in said county,' was a valid law. *Brown v. Comrs.,* 173 N. C., 598. The statute was upheld, and it was decided, *Associate Justice Brown* delivering the opinion, that there was nothing in these amendments which prohibited the Legislature from authorizing county commissioners or other governmental boards to raise money by the issue of bonds or by current taxation to enable them to carry out the necessary measures for the orderly and proper government of their counties, or even more restricted territory. . . . (p. 218-19.) *An interpretation of the recent amendments which would destroy or impair legislative power to the extent suggested would be of such serious and threatening consequence that it should not be sanctioned except by provisions so plain of meaning that no room for a different construction is allowable.* We are clearly of opinion that this well considered case of *Brown v. Comrs., supra,* is fully supported by the authorities cited and is decisive of the questions presented on this record. It is suggested that the legislation in question *is in some way in contravention of Article VIII, sections 1 and 4, of the Constitution,* the latter section being also one of the recent amendments referred to, but we do not see how either of these sections is in any way involved in the present appeal. *While it is not desirable nor ordinarily permissible to decide questions of this nature otherwise than on an issue directly presented* (*Commissioners v. Lacy,* 174 N. C., 141), *it may not be improper to suggest that this Article VIII is entitled 'Corporations other than municipal,' and section 1 would seem clearly to have reference to private or business corporations, and does not refer to public or quasi-public corporations acting as governmental agencies.*" (Italics mine.) This *obiter dictum* has been approved in several decisions since rendered.

In *Martin County v. Trust Co.,* 178 N. C., 26 (27), it is said: "This is a controversy submitted without action upon facts agreed, and involves the validity of $150,000 bonds proposed to be issued by the county of Martin under authority of Public-Local Laws, 1919, chap. 53, entitled 'An act to authorize the boards of commissioners of Martin and Bertie counties to build a bridge over the Roanoke River at Williamston, N. C., and for other purposes.' "

In sustaining this bond issue and approving the *Brown* and *Mills cases, Clark, C. J.,* said: "The rule to be deduced from these authorities may be thus summed up: The construction and maintenance of roads and bridges is a matter of general public concern. The whole body of the people of this State is benefited by them. *The Legislature may cast the expense of such public works upon the State at large, or upon territory specially and immediately benefited, even though the work may not be within a part of the total area attached.*" (Italics mine.)

In *Dickson v. Brewer,* 180 N. C., at p. 406, *Allen, J.,* says: "School districts, incorporated by act of the General Assembly, are public municipal corporations, and as such come under the provisions of Article VII of the Constitution, entitled 'Municipal corporations.' (See *Smith v. School Trustees,* 141 N. C., 150, where the question is fully discussed. Also *Williams v. Comrs.,* 176 N. C., 557), and not under Article VIII, which is entitled 'Corporations other than municipal,' and section 1 would seem clearly *to have reference to private business or business corporations, and does not refer to public or quasi-public corporations acting as governmental agencies. Mills v. Comrs.,* 175 N. C., 218." (Italics mine.)

In *Comrs. v. Bank,* 181 N. C., 347 (350-1), *Clark, C. J.,* says: "This Court has repeatedly upheld acts incorporating boards of road commissioners, vesting in them the power to issue bonds and giving them full control over the construction, maintenance, laying out, altering and discontinuing of roads and highways. *Comrs. v. Comrs.,* 165 N. C., 632, citing numerous cases, saying, 'The Legislature has the authority to create a board of road commissioners and vest them with the authority over the roads that the county commissioners had theretofore possessed, quoting *Trustees v. Webb,* 155 N. C., 383, to the same effect and saying that 'the jurisdiction of the road commissioners to these matters *is subject to regulation, in the discretion of the Legislature.*' " (Italics mine.)

In *Honeycutt v. Comrs.,* 182 N. C., 319 (320-21), *Stacy, J.,* says: "The act under consideration, among other things, provides as follows: 'Sec. 3. The road commissioners herein created shall have entire control and management of the public roads and bridges of Stanly County. That it shall be the duty of said board to take charge of working, repairing, maintaining, altering and constructing all roads and bridges of Stanly County now maintained by the county as public roads and bridges and such as may be hereafter built.' Thus it will be seen that the purpose of the act in question was not to authorize the laying out, opening, altering, or discontinuing of any given road or highway, but to provide ways and means by which the general road work of the entire county might be successfully carried on and maintained. The two highway commissions hitherto existing in the county were to be abolished and one new central system established. It has been held with us in a number of cases that acts of this character do not fall within the constitutional prohibition against local or private legislation. *Brown v. Comrs.,* 173 N. C., 598, and cases there cited; *Mills v. Comrs.,* 175 N. C., 215; *Martin County v. Trust Co.,* 178 N. C., 27; *Comrs. v. Pruden,* 178 N. C., 394; *Comrs. v. Bank,* 181 N. C., 347, and cases there cited." But for the old Court, through *Justice Brown* writing the majority opinion for the Court in the *Brown case, supra,* giving a liberal interpretation to the Constitutional Amendments, the highway system of the State would have been in quick-sand and perhaps the State Highway System would have never been as now spoken of as the greatest in the nation.

These matters were again passed on by *Adams, J.,* in *Coble v. Comrs.,* 184 N. C., 342 (348-9), where it is said: "We should apply the principle that every presumption is to be indulged in favor of the validity of the statute, that the General Assembly is presumed to have acted with an honest purpose to observe the restrictions and limitations imposed by law, and that legislation will be sustained unless its invalidity is 'clear, complete and unmistakable,' or unless the nullity of the act is beyond a reasonable doubt," citing numerous authorities. *Comrs. v. Pruden,* 178 N. C., 394; *S. v. Kelly,* 186 N. C., 365; *Reed v. Engineering Co.,* 188 N. C., 39.

In *Yarborough v. Park Commission,* 196 N. C., 284, there was a unanimous decision by this Court, *Adams, J.,* writing the opinion for the Court (p. 288), "The defendant is an agency of the State." (p. 291) "The act is public, not private. A public statute is a universal rule which regards the whole community as distinguished from one which operates only upon particular persons and private concerns. It is usually applicable to all parts of the State, *but the statute will not be deemed private merely because it extends to particular localities or classes of persons.* 25 R. C. L., 763; *S. v. Chambers,* 93 N. C., 600." (Italics mine.)

The Great Smoky Mountain National Park Act, where individual and corporation property was taken "for pleasure and sentiment," was held constitutional as a public purpose in a locality in the northwestern part of the State, *Yarborough case, supra* (p. 290): "The fund, $2,000,000, is vastly inadequate to pay for the lands, which are within the scope and contemplation of the act," and with the knowledge that it was to be turned over to the U. S. Government.

This Park Act was held to be an agency of the State and a public purpose, although the park is in the northwestern corner of the State—some 500 miles from Morehead City. Its purpose is for pleasure, but indirectly to create for that section of the State a "tourist industry." The present act is to construct, maintain and operate terminal or terminals which will open up a section of eastern North Carolina, to cheapen freight rates and encourage water commerce in that part of the State.

It has been the dream of a multitude of North Carolinians and they have had a vision for long years to open up for commerce the great water fronts of eastern North Carolina, so that cotton, tobacco and other agricultural products and the products of the textile, furniture and other industries in North Carolina should go to other parts of the nation and to foreign countries through these ports and thus obtain cheaper freight rates and bring back necessary products of other states and of foreign lands. Railroad facilities and hard-surfaced highways to these eastern North Carolina ports are ready for water facilities.

When the present act was passed, what was the purpose and spirit? In construing the act let us get the setting: Morehead City has a population of about 5,000 inhabitants and is on Bogue Sound. It is connected with Beaufort, a city of about 4,500 population, by a $1,000,000 highway bridge across Bogue Sound. From Morehead City to the Atlantic Ocean bar is about 3 miles, with a harbor of 25 to 35 feet of water. The great inland waterway, constructed by the National Government, is 12 feet deep and extends from Boston, Mass., to New York, Philadelphia, Baltimore, Washington, Norfolk, *Morehead City,* Wilmington, Charleston, Brunswick, Jacksonville (contemplated across Florida by a canal) then to Pensacola, Mobile, New Orleans, etc. It has been the south's dream for 100 years and is being built and surveyed. The Inland Waterway has been completed through North Carolina and is now being carried on down through South Carolina, and the survey is now being completed further south. The canal, it is contemplated, will cross the northern portion of Florida and would cut 21 hours off a boat trip from New York to New Orleans. Morehead City is the terminus of the Atlantic and N. C. R. R. (owned by the State) now leased to the Norfolk and Southern R. R., and runs back into the State. No. 10, the "Main Street" of North Carolina, a hard-surfaced road, runs from Morehead City to Murphy, in Cherokee County—some 500 miles. About 1,500 yachts pass through the inland waterway at Morehead City each year. Across Bogue Sound is Atlantic Beach, one of the finest on the eastern coast of North Carolina. Fishing smacks from New England

and elsewhere during the winter months come down through the canal and drag their nets in the Atlantic Ocean and it is estimated that 75 per cent of all fish that go to northern markets are caught from the Atlantic off the eastern shores of North Carolina. The potential value of the oyster and fish industry along the eastern shore is unlimited. Morehead City is well adapted for a distributing port for water-borne commerce, except that it has no adequate port or terminal facilities, such as are demanded by the shipping interests, and such as are in keeping with other ports on the South Atlantic seaboard. Not being an industrial center, the city of Morehead depends, in a large measure, for its material and commercial welfare, upon its development as a port. This development is retarded by its present failure to offer adequate port and terminal facilities. Under present conditions, it cannot successfully compete with other South Atlantic ports which have publicly owned facilities of the nature contemplated. Millions upon millions of dollars have been spent on State and municipal terminals. I mention only a few: Norfolk, Va., Charleston, S. C., Mobile, Ala., New Orleans, La., Houston, Texas, San Diego, Los Angeles and San Francisco, Cal., Portland, Ore., Tacoma and Seattle, Wash., Boston, Mass., Providence, R. I., etc. States and cities everywhere are constructing public ports and facilities for shipping. One port—that of Portland, Ore.—has been built 113 miles from the sea; and Los Angeles, Cal., has gone 25 or 30 miles to the sea and built a port, and the port of Houston, Texas, is built 50 miles from the gulf at an expense of more than thirty millions of dollars. To have our ports and waterways improved, the U. S. Government requires public terminals.

The U. S. law on the subject: "Every United Port should own its water front, and this should be controlled by a port authority composed of the business men who have an excellent grasp of the export and import business and who are willing to devote sufficient time to the subject. These should be appointed without regard to political affiliations, and should take the broad view that the port is the property of the people at large, and that the provision of the best facilities will promote quicker ship dispatch, attract more ships, and thus enlarge the commerce of the port; that while the port terminal should be self-supporting, the charges should be adjusted to produce this result; without injury to business and that the growth of the port will mean the growth of the city and increased material prosperity to the individuals of the city and State. Those states which have only one-man ports should in particular exert themselves to develop it along the most modern lines, and the first step in this direction is the appointment of a competent port authority." And further in the River and Harbor Act of 2 March, 1919, appears the following: "It is hereby declared to be the policy of Congress *that water terminals* are essential to all cities and towns located upon harbors or navigable waterways, and that at least one public terminal should exist, constructed, owned and regulated by the municipality, *or other public agency of the State,* and open to the use of all upon equal terms, and with the view of carrying out the policy to the fullest possible extent, the Secretary of War is hereby vested with the discretion to withhold, unless the public interest would seriously suffer by delay, moneys appropriated in this act for new projects adopted herein, or for the further improvement of existing projects, if, in his opinion, no water terminals exist 'adequate for the traffic, and open to all on equal terms, or unless satisfactory assurances are received that local or other interests will provide such adequate terminal or terminals."

Under the present national progressive administration, $400,000 is to be had from a sale of bonds to the Reconstruction Finance Corporation to build the port terminal at Morehead City. The present act, interpreted according to the setting, its spirit and intent, is in every respect an agency of the State and fulfills the requirements of a public corporation, as laid down by Thompson on Corporations, *supra.* It does not contravene Art. VIII, sec. 1, of the Constitution. Under the Congressional Act above set forth, the port authorities should be composed of "the business men who have an excellent grasp of the export and import business," etc. The present act, Private Laws, 1933 chap. 75, the one under consideration, requires a board "composed of 5 members, all of whom shall be experienced business men," etc., to constitute the Port Commission of Morehead City, N. C., these to be selected by the board of commissioners of Morehead City and be residents of the city. Thompson, *supra,* says: (1) "Thus a public corporation is subject to legislative control without any reference to the consent of the persons who control it." These five members comprising the Port Commission are subject to legislative control without their consent. (2) "A public corporation does not originate in contract, while a private corporation does, and therefore the instrument creating the latter cannot be altered or amended by the law-making power, without the consent of the members who compose it, unless such power is expressly reserved. Public corporations are mere creatures or instrumentalities of the State and are subject to governmental visitation and control. So, the property of a public corporation is not taxable, while that of a private corporation is." The present Port Commission does not originate in contract and its property and bonds issued are exempt from taxation. It has power: "(a) To sue and be sued in the name of the said Port Commission; to acquire by purchase and condemnation, and to hold lands for the purpose of constructing, maintaining or operating the terminal or terminals hereinafter referred to, and to make such contracts and to hold such personal property as may be necessary for the exercise of the powers of the said Port Commission. (b) To charge and collect reasonable and adequate wharfage fees and other fees, tolls or dues for the use of such city terminal or terminals, or for the service rendered in the operation thereof. (c) To develop the port facilities of Morehead City by acquiring by purchase (construction or otherwise), improving, maintaining and operating a city terminal or terminals for said city, upon the water front of said city, including all necessary wharves, piers, bulkheads, slips, docks, sheds, warehouses, elevators, and railroad and steamship facilities, and also necessary lands, rights in lands and water rights, to be used and operated for the following purposes, namely: for the landing, loading and unloading of vessels, for the loading and unloading of railroad cars or other carriers, for the interchange or transfer of goods, merchandise or other property between vessels, railroad cars or other carriers, and for the temporary shelter or storage of goods, merchandise or property carried or about to be carried by such vessels, railroad cars or other carriers. (d) To issue bonds . . . such bonds and/or notes issued for the purpose or purposes above set out may be sold at private sale, for not less than par, to the Reconstruction Finance Corporation or other governmental agency, with the approval of the board of commissioners of Morehead City, but if such private sale is not so made to said Reconstruction Finance Corporation or other governmental agency, then the sale shall be made under the provisions of the Municipal Finance Act of the State and with the approval of the Local Government Commission. Bonds and notes issued under this act shall be exempt from all State, county or municipal taxes or assessments, direct or indirect, general or special, and the interest paid on said bonds or notes shall not be subject to taxation as income, nor shall said bonds or notes, or coupons of said bonds, be subject to taxation when constituting part of any bank, trust company or other corporation." (3) A public corporation is, generally, political in its nature, and its object is to carry out a scheme of government, while a private corporation has none of these characteristics."

The Port Commission is formed to carry out both the State and the U. S. Government schemes requiring public terminals, and the very language of the present act is to carry out a scheme of government. (4) "Public corporations, as a rule, are not liable either for the negligence or torts of their officers. Perhaps the only exception to this rule is in the case of counties, cities and towns, and then only in a limited sense, and in regard to matters involving the exercise of ministerial acts and not governmental functions."

Like the State Highway Commission, an agency of the State, no one is given the right to sue it in tort and no one given the right to sue the present Port Commission in tort.

(5) "The right to create these corporations is vested in the Legislature, subject only to constitutional limitations." The power over the present port corporation is the Legislature. It is the principal of this agency of the State with plenary power over it.

It cannot be disputed that the Legislature has the right to create the Port Commission and the act "may be altered from time to time or repealed." *Power Co. v. Elizabeth City,* 188 N. C., 278 (287). And to show it is a public agency of the State, absolutely under its control, through the Legislature, the act itself says: Sec. 11. "That it is hereby declared to be the policy of the State of North Carolina to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation, and that Morehead City, North Carolina, *is hereby declared to be a port to be developed in connection with the interior of the State of North Carolina and other states, and that it is hereby declared and deemed by the State of North Carolina necessary and desirable and in the public interest of the entire State that there shall be established through Morehead City,* through connecting water and rail rates in connection with shipping companies and other transportation companies and in accordance with the provisions of the acts of Congress in the United States and the laws of North Carolina. *The said Port Commission* shall be regarded as performing an essential governmental function in *undertaking the construction, maintenance and operation of the said terminal or terminals and in carrying out the provisions of this act in relation thereto, and shall be required to pay no taxes or assessment upon any of the properties acquired or used by it for such purposes."* (Italics mine.)

If the Great Smoky Mountain National Park (N. C. Park Commission) is an agency of the State in the corner of northwestern North Carolina, so decided by this Court in an unanimous decision, then the act under consideration is a State agency, in the eastern part of North Carolina. In these deflated times, as never before in the history of this nation, is the National Government taking so great an interest in national resources and giving employment in the entire nation and this section. For example: The Great Smoky Mountain National Park development in North Carolina and a connecting road to the Shenandoah National Park in the State of Virginia through North Carolina; the Cape Fear River project, making same navigable from Fayetteville; the Muscle Shoals development and the Norris Dam part of the huge

Tennessee Valley Authority; river improvement and flood control projects in the Mississippi Valley; the inland waterway which goes through Morehead City, and which is now being surveyed to cross Florida by canal, and numerous other projects to build up and give employment to millions of people. The U. S. Government is ready to finance this port development to the extent of $400,000, which would give employment to untold needy and be the entering wedge to develop the other cities and towns on the eastern seaboard of North Carolina, where there is no finer water front anywhere in the nation, and give cheaper freight rates; encourage the fish and oyster industry and water-borne commerce. These eastern ports would soon teem with trade, through water commerce and railroads and hard-surfaced roads. The railroad would reawaken with traffic. This beneficent legislation should not be destroyed "unless the nullity of the act is beyond a reasonable doubt."

The railroads and hard-surfaced State highways now run to a dead end. This progressive legislative enactment tends to unbottle the eastern waters of North Carolina for water-borne commerce and gives new commercial life to the railroads and hard-surfaced State highways.

BROGDEN, J. dissenting: The two primary questions of law are the following:

1. Is the "board to be known as the Port Commission of Morehead City" a municipal corporation within the contemplation of the Constitution and laws of this State?

2. Is chapter 75, Private Laws of 1933, constitutional?

There are certain secondary questions of law presented, but the solution of such questions depends upon the conclusion reached upon the primary questions propounded. The indivisible characteristics of a municipal corporation and the general scope and meaning of the term was described by *Hoke, J.,* in *Southern Assembly v. Palmer,* 166 N. C., 75, 82 S. E., 18. The distinguished jurist wrote: "The term, as used in our Constitution, from the context and its primary significance, evidently refers to municipal corporations proper, as cities and towns, etc., and to those public *quasi*-corporations, such as counties, townships, etc., in which the inhabitants of designated portions of the State's territory are incorporated for the purpose of exercising certain governmental powers for the public benefit. This may be for the benefit of the general public as for the State at large, and also for the public benefit of the particular locality, but it is as a governmental agency and when established as exclusively such, and for that reason, that this exemption is allowed, and it was never intended to embrace a corporation like the present plaintiff, which, however high its aim and purpose, is, in its form and controlling features, a business enterprise, and on which municipal powers have been incidentally conferred in promotion of the primary purpose.

"This concept of a municipal corporation as embodying the elements, (a) designated territory, (b) the inhabitants within the same, and (c) the existence of governmental powers conferred and to be exercised for the public benefit, both general and local, is recognized in many decisions here and elsewhere and in authoritative textbooks treating of the subject." Copious quotations from the authorities are contained in the opinion. It was suggested in *Commissioners v. Webb,* 160 N. C., 594, 76 S. E., 522, that the power to levy taxes for the purpose of general revenue was one of the tests of the existence of a municipal corporation.

A study of decided cases discloses that, while the term "municipal corporation" originally applied to cities and towns, the significance of the term has been expanded and broadened to keep pace with the necessities and development of modern society. Hence public corporations, created by the State as governmental agencies or for the purpose of exercising specified governmental functions in prescribed portions of the State's territory, are to be regarded as municipal corporations. Thus in *Smith v. School Trustees,* 141 N. C., 143, 53 S. E., 524, it was written: "But in using the term 'municipal corporations' in this connection, these writers do not use the word in its restricted sense of municipal corporations proper, confining it to cities and towns, but in a more enlarged and generally received acceptation, which includes municipal corporations technically so termed, and also public corporations created by the State for the purpose of exercising defined and limited governmental functions in certain designated portions of the State's territory," etc. It is apparent from these definitions, which are supported by practically unanimous authority, that a municipal corporation must either be a city, town, school district or other subdivision of the government, or, at least, a public corporation endowed with governmental powers and acting as a governmental agency.

Manifestly, the Port Commission is not a city, town or governmental subdivision. Hence the question arises: "Is the Port Commission as set up in chapter 75, Private Laws of 1933, a governmental agency?" It is obvious that an agent must have a principal. For whom is the Port Commission an agent? Only two answers can be given to this question. It must either be a governmental agency of Morehead City or of the State of North Carolina. Is it then a governmental agency of Morehead City? Morehead City has no control over it. While the city appoints the commissioners, it cannot remove them or call them to account. It is true that the Port Commission must submit reports to the governing authorities of the city, but nothing can be done about it after they are submitted. The Port Commission purchases or condemns property according to its own notion, and takes and holds title thereto in its own name, free from the control or supervision of the city. The purchase price of such property is paid from funds owned and controlled by the Port Commission, and if there is a surplus from the operation of the projects, such surplus belongs to the Port Commission, and it can use and dispose of the same according to its own discretion and judgment. Bonds can be issued, not in behalf of Morehead City, but in the name and behalf of the Port Commission, and no liability accrues to the city. If it be conceived that the Port Commission is an agency of Morehead City, then it is obvious that the agent is superior to the principal. Such a result, at least, would constitute a legal freak.

Section 3 of the act authorizes the Port Commission "to develop the port facilities of Morehead City by acquiring, . . . maintaining and operating a city terminal or terminals for said city upon the water front of said city," etc. It is contended that the words "for said city" imply that the Port Commission is performing a municipal or governmental function of Morehead City. Manifestly, if Morehead City had a terminal, it could lease the same to a private enterprise for purposes of operation, and consequently such operation would be done "for said city." Governmental powers are not to be delegated or conferred upon a corporation by bare implication or by building sovereignty upon a phrase of this sort.

If it had been the intention of the General Assembly of North Carolina to create the Port Commission as an integral and indivisible part of the city government of Morehead City, such intention should have been declared in apt and appropriate words.

It would seem, therefore, that the Port Commission was not fashioned by the statute as a part of the governmental function of Morehead City or endowed with any of the governmental power of said city; and hence we come to consider the question as to whether the Port Commission is a governmental agency of the State of North Carolina. At the outset it is to be observed that the State has no control over the Port Commission, either in the selection of its personnel or in the discharge of its functions. The property purchased by the commission will not belong to the State or be acquired in the name of the State. The bonds will not be issued in the name of the State or create any State obligation. It can perform no act binding upon the State. The funds derived from the operation do not belong to the State, nor are they subject to State supervision or control. The salaries to be paid, are not subject to State regulation or inquest. If there is a profit and such is not absorbed in paying salaries, stipends and emoluments to agents and employees, such profit can be thrown into the Atlantic Ocean so far as the State is concerned.

If the Port Commission is a State agency, manifestly it can operate anywhere within the boundaries of the State, because the act prescribes no designated territory for its activities, and creates for it no inhabitants. Hence the Port Commission could use its funds to build terminals and docks in Southport or condemn land for warehouses in Asheville or Micaville.

The theory that the Port Commission is an arm of the State is based upon the idea that the encouragement of water transportation by building terminals and docks at Morehead City will reduce freight rates and aid and facilitate the commercial prosperity of the State. Of course, such a consummation is devoutly to be wished, but the same laudable proposition would be involved in the construction of a railroad or steamship line, and it could not be seriously contended that such enterprises, although exercising governmental power, would constitute municipal corporations within the purview of the Constitution of this State. The fundamental policy of the State inheres in its Constitution, and legislative declarations of policy are persuasive and controlling so long as they are not subject to the superior mandate of the Constitution.

It has been held that Port Commissions, created in various parts of the United States, are municipal corporations, but an examination of the acts creating such Port Commission leaves no doubt not only as to the actual endowment of the corporation with governmental powers but also its actual creation as a governmental agency. See *Rosencranz v. City of Evansville,* 143 N. E., 593; *Paine v. Port of Seattle,* 126 Pac., 628; *Cook v. Port of Portland,* 27 Pac., 263.

A consideration of all the principles of law involved, leads me to the conclusion that the Port Commission, as set up in chapter 75, Private Laws of 1933, is not a municipal corporation.

If the Port Commission is not a municipal corporation and within the boundaries of Article VII of the Constitution of North Carolina, it must be classified under Article VIII, section 1, of said Constitution for the reason that said article undertakes in express words to define and interpret "corporations other than municipal." Section 1 declares: "No corporation shall be created, nor shall its charter be extended, altered or amended by special act," etc. Chapter 75, Public Laws of 1933, is a special act. It is contended, however, that this Court has interpreted Article VIII, section 1, to apply exclusively to private enterprises. This contention is based upon the following decisions: *Mills v. Commissioners,* 175 N. C., 215, 95 S. E., 481; *Dickson v. Brewer,* 180 N. C., 403, 104 S. E., 887, and *Watts v. Turnpike Co.,* 181 N. C., 129, 106 S. E., 497. It is to be noted that the *Mills case* and the *Dickson case* involved the exercise of power by a school district and two counties.

School districts and counties have always been held to be municipal corporations. The *Watts case* involved a business enterprise and in discussing the rights of parties with reference to Article VIII, section 1, of the Constitution, the Court said: "The inhibitory features and effect of these amendments do not apply or extend to municipal or *quasi*-public corporations, such as counties, cities, towns and other recognized governmental agencies," etc. In the *Dickson case, supra,* referring to Article VIII, section 1, of the Constitution, the Court said that this clause of the Constitution "would seem clearly to have reference to private or business corporations and does not refer to public or *quasi*-public corporations acting as governmental agencies." In other words, all corporations within the purview of Article VII of the Constitution, and all corporations acting as governmental agencies are outside the inhibition of Article VIII, section 1. Conversely all corporations, public or private, which are not created as governmental agencies, fall within the inhibition of Article VIII, section 1, of the Constitution.

The opinion of the Court does not interpret the Port Commission as a municipal corporation, within Article VII of the Constitution, and moreover, declares that it is not a corporation other than municipal within Article VIII. Consequently it is neither fish nor fowl. It is apparently some sort of a new creature defying constitutional classification that can wander at will in and about the State, incurring no liability, and subject to no control, regulation or supervision. It owns neither a grain of sand nor drop of water as a basis of credit, and its only asset is the promise of a loan of money.

Undoubtedly, the Legislature had the power to fashion the Port Commission as a piece of governmental machinery and supply it with all the necessary running parts essential to the discharge of contemplated function. It had the power to create a State agency, subject to the supervision and control of the sovereign as in the *Park case,* 196 N. C., 284, or as a municipal agency as in the *Brockenbrough case,* 134 N. C., 1, without invading or offending Article VII or Article VIII of the Constitution. But it chose to do neither. Instead, it set up a skeleton without a drop of governmental blood or a breath of governmental life, and the Court is called upon to work a miracle and clothe it with nerve and sinew and make it a living soul.

The sole question of law in this case is the construction of a statute as written. The Court is not charged with the duty of giving a transfusion of constitutional blood. The language is plain. Judicial legislation in the guise of interpretation of a statute is not within the constitutional function of the Court.

The underlying reasons for the creation of the Port Commission and the anticipated result from such creation are wide reaching, but the problem for us to determine is whether or not the act as written actually constitutes the Port Commission as a governmental agency. My conclusion is that it does not and that the act ought to fail.

I am authorized to say that *Stacy, C. J.,* concurs in this dissent.

ALICE R. MAHLER v. MILWAUKEE MECHANICS INSURANCE COMPANY AND THE METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 10 January, 1934.)

1. **Insurance J e—Under facts of this case mortgagee's interest in insurance held not forfeited by its failure to notify insurer of change of title.**

In this case the agent for the insurer was notified prior to the issuance of the renewal policy sued on that the property had been sold by the former owner to another and was requested to issue the renewal policy in the name of the new owner. The policy contained a standard loss payable clause in favor of the holder of the mortgage on the property, which clause provided that any neglect on the part of the owner or mortgagor to give notice of increased hazard, change of title, etc., should not affect the mortgagee's rights under the loss payable clause, provided the mortgagee gave insurer such notice upon its knowledge thereof. The renewal policy was issued without change in the name of the owner of the property, and thereafter the mortgagee was informed of the change in ownership and that the insurer's agent had been given notice of such change prior to the effective date of the policy. *Held,* under the facts and circumstances of the case the mortgagee was not required to notify the insurer of the change in ownership, it appearing to the mortgagee that such notice had been given the insurer's agent prior to the inception of the policy, the agent in such case being the insurer's *alter ego.* C. S., 6420.

2. **Insurance K a—Held: agent of insurer had no interest in the property insured preventing his knowledge from being imputed to insurer.**

The owner of certain property insured against fire by defendant insurer exchanged the lands for other lands on which the insurer's agent held a mortgage. Insurer's agent, prior to the effective date of the policy, was notified of the change in ownership and was requested to issue the policy in the name of the new owner. *Held,* the agent had no interest in the property insured, and the rule that knowledge of the agent at the inception of the policy is imputed to the insurer applies.

3. **Insurance E d—Rights under policy may be assigned as chose in action without assignment of the policy.**

Where the owner of land takes out fire insurance thereon with loss payable clause in favor of his mortgagee, and thereafter sells the property to another, and requests the agent of the insurer to issue a renewal policy in the name of the new owner with loss payable clause in favor of the same mortgagee, the agent's knowledge of the change of title prior to the issuance of the renewal policy is imputed to the insurer, and where the mortgagor and subsequent owner have assigned their rights under the policy, the assignee may bring action against the insurer to recover for loss by fire occurring subsequent to the issuance of the renewal policy, and to have such recovery impressed with a trust in favor of the mortgagee, the assignee being the real party in interest and the rights under the policy being assignable as a chose in action.

4. **Insurance E c—**

Where the knowledge of the insurer's agent of a violation of a condition of the policy is imputed to the insurer, and the insurer is thus estopped from declaring a forfeiture of the policy on that ground, it is not necessary that the policy be reformed in order for insured to recover thereon.

APPEAL by defendant, Milwaukee Mechanics Insurance Company, from *Frizzelle, J.,* at Chambers, 30 June, 1933. From JOHNSTON. Affirmed.

The agreed statement of facts is as follows:

"This action is now pending in the Superior Court of Johnston County, and the parties hereto desiring to waive a jury trial, agree upon the following facts and submit the same to the judge holding the courts of Johnston County for a judgment as may be just and proper:

1. That on and prior to 22 October, 1930, R. P. Holding was the owner of a tract of land containing about 119.86 acres, lying and being in Selma Township, Johnston County and said lands were encumbered as follows:

(a) A deed of trust securing the Metropolitan Life Insurance Company in the sum of $2,250 and said deed of trust is recorded in Book 167, page 69, of the Johnston County registry.

(b) A mortgage deed to Alice R. Mahler in the sum of $6,750, and this mortgage is recorded in Book 195 at page 202 of the Johnston County registry.

2. That Harvey Atkinson and wife on or about 22 October, 1930, and prior thereto were owners of a tract of land of about 72 acres lying and being in Selma Township, Johnston County, and said lands were encumbered, besides other mortgages and deeds of trust, by a mortgage from the said Harvey Atkinson and wife to Roger A. Smith, Jr., in the sum of $150.15 and was of record in Book 243, at page 137, Johnston County registry.

3. That on 22 October, 1930, said R. P. Holding and wife, Maggie B. Holding, conveyed to Harvey Atkinson and wife, Minnie S. Atkinson, the said 119.86 acres of land by deed, and the said Harvey Atkinson

and wife, Minnie S. Atkinson, conveyed to R. P. Holding and wife. Maggie B. Holding, a tract of land containing 72 acres, said tracts being the ones described in the paragraphs above. That the said 119.86 acres conveyed by Holding to Atkinson were encumbered by a deed of trust to Metropolitan Life Insurance Company, and by a second mortgage to Alice R. Mahler.

4. That Roger A. Smith, Jr., on 22 October, 1930, and prior thereto, as well as a long time thereafter, was a resident of Smithfield, Johnston County, State of North Carolina, and was duly authorized local agent of the Milwaukee Mechanics Insurance Company, which company was engaged during the times mentioned in writing fire insurance in the said county of Johnston.

5. It is admitted that Roger A. Smith, Jr., duly authorized local agent of Milwaukee Mechanics Insurance Company, had knowledge of the deed of trust to Metropolitan Life Insurance Company on the 119.86 acres and it is also admitted that Roger A. Smith, Jr., had knowledge that said property was encumbered by a second mortgage to Alice R. Mahler. That at the time of the trade of the lands between Harvey Atkinson and R. P. Holding as set out above, the said Roger A. Smith, Jr., was duly notified of the intention of the parties to make said trade and he knew the day on which the trade between the parties was finally consummated, to wit, on 22 October, 1930, this fact being admitted by said Roger A. Smith, Jr.

6. That on 22 October, 1930, said R. P. Holding was insured for the benefit of the said Metropolitan Life Insurance Company upon the buildings situate on the 119.86 acres, and after the trade was made by the said assured and Harvey Atkinson and wife, the said Roger A. Smith, Jr., was notified as agent to change the assured on his policy then in force from R. P. Holding to Harvey Atkinson and wife, Minnie S. Atkinson, but the said agent failed to make said change. That said policy expired on 8 November, 1930. That some time between 10 October, 1930, and 3 November, 1930, Roger A. Smith, Jr., agent for the Milwaukee Mechanics Insurance Company, wrote policy No. 13 of said company insuring said buildings in the name of R. P. Holding, although said R. P. Holding was not the owner of said property after 22 October, 1930, as the said Roger A. Smith, Jr., knew and he knew that the said Harvey Atkinson and wife, Minnie S. Atkinson, were the owners of said property after 22 October, 1930, subject to the encumbrances against said property as set out in paragraph 5 hereof. That said policy is attached hereto and made a part of the agreed statement of facts. That said policy insured the buildings on said property from 8 November, 1930, at noon, to 8 November, 1931, at noon. That said policy was forwarded to the Metropolitan Life Insurance Company at

Raleigh, N. C.; that the premium on said policy was not paid to Roger A. Smith, Jr., by anyone.

7. That on 31 October, 1930, the Metropolitan Life Insurance Company for the first time was informed by R. P. Holding that he did not own said lands and was informed that the said Harvey Atkinson and wife, Minnie S. Atkinson, were the owners of same and were informed by the said R. P. Holding that he had notified Roger A. Smith, Jr., agent for the Milwaukee Mechanics Insurance Company, of said change of ownership by letter as follows:

'Smithfield, N. C., 31 October, 1930. Mr. A. T. Dixon, manager, Carolina Branch Office, 131 South Salisbury Street, Metropolitan Life Insurance Company, Raleigh, N. C. Dear Mr. Dixon: Loan BO-226. You will please find enclosed herewith check for $135.00 to cover interest on the Alice and J. E. Mahler mortgage loan to 1 November, 1930. Several days ago I received a letter from your office with reference to the insurance on the buildings of this farm expiring 8 November, 1930, I wish to advise that I have traded my equity in this farm to Mr. Harvey Atkinson, Smithfield, N. C., R.F.D. No. 2, and I have so advised Mr. Roger A. Smith, Jr., who issued the policy in this connection. Please send future notices of interest payment to Mr. Atkinson, as I have no further interest in the farm. Yours very truly, R. P. Holding. Copy to Mr. J. E. Mahler, Smithfield, N. C.'

8. That said policy was received by Metropolitan Life Insurance Company some time between 10 October and 3 November, 1930. That said Metropolitan Life Insurance Company did not notify Roger A. Smith, Jr., or the Milwaukee Mechanics Insurance Company of the contents of the letter which it had received from said R. P. Holding as set out above. That said policy had attached to it a New York Standard Mortgagee's clause in favor of the Metropolitan Life Insurance Company, with loss payable to it as mortgagee, a copy of said loss payable clause being hereto attached and made a part of the agreed statement of facts.

9. That on 24 December, 1930, while said policy was in force the building described in said policy as a barn was totally destroyed by fire and on or about 5 January, 1931, the building described as dwelling No. 1 was totally destroyed by fire, and that the loss had been appraised at $400.00 for the barn and $1,278.22 for the dwelling and all parties agree that this is a fair appraisal of said loss and if liability exists under this policy that the loss be fixed at this amount, with interest from 15 November, 1931.

10. That Alice R. Mahler has been assigned all right, title and interest in said policy and in any right of action upon the same for the

loss of said property by R. P. Holding, Harvey Atkinson and wife, Minnie S. Atkinson.

From the foregoing statement of facts the plaintiff Alice R. Mahler contends that she is entitled to receive from the Milwaukee Mechanics Insurance Company the sum of $1,678.22 with interest from 15 November, 1931, the said sum to be impressed with the trust in favor of the Metropolitan Life Insurance Company, and the defendant Metropolitan Life Insurance Company contends it is entitled to said amount by virtue of a New York Standard Mortgagee's clause in its favor attached to said policy, and the Milwaukee Mechanics Insurance Company contends that it is not liable to the plaintiff or the Metropolitan Life Insurance Company for that the plaintiff claims only as assignee of R. P. Holding and Harvey Atkinson and wife (see assignment attached to complaint); and as the assignors cannot recover, the assignee cannot recover; that the Metropolitan Life Insurance Company cannot recover for that under the New York Standard Mortgagee Clause attached to the policy (see provision set out in answer of Insurance Company) it was the duty of the said Life Insurance Company to notify the Fire Insurance Company of the change of ownership.

The judgment of the court below is as follows: "This cause having been submitted to the undersigned judge upon an agreed statement of facts and with written stipulations that judgment upon the said agreed statement of facts might be rendered out of term and out of the district, the said undersigned judge having taken the said agreed statement of facts under advisement and given the same full and careful consideration the contentions of the parties to the action as set out in briefs filed by each of said parties and the court being of the opinion that plaintiff is entitled to recover upon her cause of action: It is therefore considered, ordered and adjudged that Alice R. Mahler, plaintiff, recover of the Milwaukee Mechanics Insurance Company one of the defendants, the sum of $1,678.22, with interest from 15 November, 1931, until paid. It is further considered, ordered and adjudged that the said sum of money is impressed with a lien in favor of the Metropolitan Life Insurance Company, mortgagee, as set out in the contract in the policy of insurance, the basis of this suit, by virtue of the loss payable clause attached to said policy, as its interest may appear, by reason of that certain deed of trust recorded in Book 167, page 69, of the Johnston County registry. It is further ordered that the defendant, the Milwaukee Mechanics Insurance Company pay the cost of the action as taxed by the clerk of this court. Done at chambers, this 30 June, 1933."

The exception and assignment of error made by Milwaukee Mechanics Insurance Company, is as follows: "That the judgment of his Honor upon the pleadings and the statement of agreed facts is erroneous."

Leon G. Stevens for Alice R. Mahler.
Manning & Manning for Milwaukee Mechanics Insurance Company.
Winston & Tucker for Metropolitan Life Insurance Company.

CLARKSON, J. We cannot hold that the judgment of the court below, upon the pleadings and the statement of agreed facts, is erroneous.

The New York Standard Mortgagee Clause attached to the policy issued in this controversy, is as follows: "New York Standard Mortgagee Clause for use in connection with first mortgage interest on real estate. Loss, or damage, if any, under this policy shall be payable to the Metropolitan Life Insurance Company, as mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same. Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void. This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement. Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that as to the mortgagor or owner, no liability therefor existed, this company shall to the extent of such payment be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Dated 8 November, 1930. Mechanics Insurance Company, of Milwaukee. Roger A. Smith, Jr. (Signature for Company.)"

The defendant, Milwaukee Mechanics Insurance Company's first contention is that it was "the duty of the Metropolitan Life Insurance Company, beneficiary named in the New York Standard Mortgage Clause, to report to the Milwaukee Mechanics Insurance Company the change in ownership of the property covered by the insurance, and the effect of its failure so to do" makes the policy null and void.

We cannot so hold, under the facts and circumstances of this case. It will be noted that the rider was dated 8 November, 1930 "attached to policy No. 13 of the Milwaukee Mechanics Insurance Company of Milwaukee—Roger A. Smith, Jr. (Signature for Company.)"

In the findings of fact Nos. 4 and 5, *supra,* it is admitted: "That Roger A. Smith, Jr., on 22 October, 1930, and prior thereto, as well as a long time thereafter . . . was the duly authorized local agent of the Milwaukee Mechanics Insurance Company," etc.—"had knowledge," etc.

In *Bank v. Ins. Co.,* 187 N. C., 97 (102), citing a wealth of authorities, it is said: "With respect to the rights of the mortgagee under the standard mortgage clause, it is the generally accepted position that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent, at least, of not being invalidated by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee; and, according to the clear weight of authority, this affords protection against previous acts as well as subsequent acts of the assured." C. S., 6420; *Bank v. Bank,* 197 N. C., 68; *Peeler v. Casualty Co.,* 197 N. C., 286; *Bennett v. Ins. Co.,* 198 N. C., 174.

In *Johnson v. Ins. Co.,* 172 N. C., 142 (147-8), we find: "In *Bergeron v. Ins. Co.,* 111 N. C., 47, the Court quotes with approval from May on Insurance, that 'facts material to the risk, made known to the agent (or a subagent intrusted with the business) before the policy is issued, are constructively known to the company, and cannot be set up to defeat a recovery on the policy'; and in *Grabbs v. Ins. Co.,* 125 N. C., 395: 'It is well known that as a general rule fire insurance policies are issued in a different way from those of life insurance companies. The latter are usually issued directly from the home office, while fire insurance policies are generally sent to the local agent in blank, and are filled up, signed and issued by him. The blanks, while purporting to be signed by the higher officers of the company, usually have their names simply printed thereon in autographic facsimile. Under such circumstances, can it be doubted that the policy is issued by the agent, who, for all purposes connected with such insurance, is the *alter ego* of the insurer? That he is, seems too well settled to need citation of authorities, and therefore his knowledge is the knowledge of the company. We can only repeat what we have so recently said in *Horton v. Ins. Co.,* 122 N. C., 498, 503: 'It is well settled in this State that the knowledge of the local agent of an insurance company is in law the knowledge of the principal; that the conditions, in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer; and that such waiver may be presumed from the acts of the agent.' The same authorities also support the position that if the defendant issued the policy knowing the conditions existing at the time, it cannot now avoid responsibility on account of those conditions. Nor does the provision in the policy restricting the power of the agent to waive conditions and stipulations affect the application of this rule, because the restrictions are generally construed to apply to something existing at the inception of the policy." *Bullard v. Ins. Co.,* 189 N. C., 34; *Midkiff v. Ins. Co.,* 197 N. C., 139; *Houck v. Ins. Co.,* 198 N. C., 303; *Smith v. Ins. Co.,* 198 N. C., 578. This matter has recently been discussed in *Hill v. Ins. Co.,* 200 N. C., 115.

Roger A. Smith, Jr., was the duly authorized local agent of the Milwaukee Mechanics Insurance Company. He was the *alter ego* and made this contract and had knowledge of the change in ownership of the property covered by the insurance when the contract was made. The contract was made by Roger A. Smith, Jr., "Signature for Company," with the Metropolitan Life Insurance Company. The agent Smith, the *alter ego,* knew the facts which knowledge was imputed to the company. Why the necessity of the Metropolitan Life Insurance Company giving another notice? The change of ownership was known to its *alter ego.* It may be noted that although the Milwaukee Mechanics Insurance Company, through its *alter ego,* had notice of the change in ownership, yet the company, with this knowledge, no doubt conveyed to it by its agent, took no steps, if it could, to repudiate the act of its *alter ego,* the local agent. If it had notified the Metropolitan Life Insurance Company, a new policy could have been obtained, but it did nothing until after the fire loss and now attempts to repudiate the rider—the New York Standard Mortgage Clause.

The defendant Milwaukee Mechanics Insurance Company's second contention is: "Was the knowledge of the local agent imputable to the company?" We think so. This is fully sustained by the authorities above cited. But defendant, Milwaukee Mechanics Insurance Company contends that there is an exception, and cites *Bank v. West,* 184 N. C., 220 (223), that Roger A. Smith, Jr., has an interest inimicable to his company. This is a well grounded principle of law, upheld by this Court and the courts of other states, but is not applicable to the facts in the instant case. Roger A. Smith, Jr., by issuing the policy served no interest of his own. He did not conceal anything from the company, and his interest was not opposed to the company. His sole connection with the trade was as holder of a second mortgage on lands in nowise connected with this suit. Roger A. Smith, Jr., was not serving two masters. His only one was the Milwaukee Mechanics Insurance Company. We see no foundation in the facts of record for this contention.

The defendant, Milwaukee Mechanics Insurance Company's third contention is that "Mrs. Mahler, the plaintiff, sues only as assignee of whatever rights R. P. Holding and Harvey Atkinson and wife had." It is contended by this defendant that these parties had no rights, and therefore plaintiff had none. We cannot so hold. The Metropolitan Life Insurance Company, had a first mortgage on the property and the Milwaukee Mechanics Insurance Company, agent, the *alter ego,* renewed the insurance with the Metropolitan Life Insurance Company, with full knowledge that the land of these parties was encumbered with the mortgages. We think these parties had an equitable interest in the property subject to transfer to plaintiff. We do not think that it was necessary, under the facts and circumstances of this case, for plaintiff to ask for any reformation of the contract, and *Burton v. Ins. Co.,* 198 N. C., 498, is not applicable to the facts in this case.

This Court has uniformly held that all actions must be instituted in the name of the real party in interest. The real party in interest in this case is Alice R. Mahler, assignee. This claim or cause of action is nothing more than a chose in action which is the subject of an equitable transfer and assignment. Mr. Couch in his valuable work on Insurance, Vol. 6, section 1450-J, lays down this principle: "A mere equitable assignment, the policy itself not being assigned, will not defeat the policy under a general clause forbidding an assignment thereof, unless it is specially prohibited by the terms of the contract. But even though an assignment of a right to the proceeds in a fire policy may not be a valid legal assignment of the policy, it may operate as an equitable assignment, vesting in the assignee an equitable interest in the proceeds." Nor was it necessary that the policy of insurance be reformed. This rule is laid down in 26 C. J., p. 107: "Reformation is not necessary where insurer has waived or is estopped to rely upon a breach of a condition in the policy." The letter of R. P. Holding to the Metropolitan Life Insurance Company is immaterial.

It is admitted that Roger A. Smith, Jr., was the duly authorized agent of the Milwaukee Mechanics Insurance Company, he had actual notice of the change of owners and he also knew of the encumbrances against the property, both the first and second mortgages. He had this knowledge before the inception or effective date of the policy that was issued with rider, loss clause, New York Standard Mortgage Clause, for the benefit of the Metropolitan Life Insurance Company, that had a first mortgage. With such knowledge, the written provisions of the policy were thereby waived. For the reasons given, the judgment in the court below is

Affirmed.

ANNIE M. MEHAFFEY v. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY.

(Filed 10 January, 1934.)

1. **Insurance R a—Definition of "external, violent accidental means" as used in policy of health and accident insurance.**

   In order to recover on a policy of accident insurance conditioned upon death or injury to insured resulting "solely through external, violent and accidental means" it is necessary for claimant to show not only accidental injury or death, but also that the injury or death was produced by "accidental means," which implies "means" producing a result which is not the natural and probable consequence of such means, and it is not sufficient for recovery if the injury or death, though unexpected, flows directly from an ordinary act in which the insured voluntarily engages, but the taking of poison inadvertently or through error is an accidental means within the meaning of the contract.

2. **Same—Evidence held insufficient to show that insured's death resulted from accidental means within meaning of policy of accident insurance.**

   In an action on a policy of accident insurance providing for liability if insured should die as a result of external, violent and accidental means, expert testimony of plaintiff's witness that insured died from some poisonous substance taken internally is insufficient to overrule insurer's motion of nonsuit where all the evidence tends to show that insured had been drinking heavily and continuously sometime prior to his death, that on the morning of his death he drank some buttermilk and thereafter became sick and vomited and took some medicine given him by a pharmacist, and died shortly thereafter, without any evidence that the buttermilk or the whiskey insured had been drinking were poisonous or that the medicine was harmful, and that an autopsy showed his stomach contained blood and mucous and was inflamed, with expert testimony that such condition could have been caused by heavy drinking.

CLARKSON, J., dissenting.

CIVIL ACTION, before *Clement, J.,* at March Term, 1932, of HENDERSON.

On or about 1 July, 1930, the defendant executed and delivered to Mark L. Mehaffey a policy of life and accident insurance, covering certain employees of the Southern Railway Company and insuring against "the effects resulting directly and exclusively of all other causes from bodily injury sustained by the insured, solely through external, violent and accidental means (excluding suicide or any attempt thereat, while sane or insane)," etc. Mark Mehaffey died 21 July, 1930.

A friend of the deceased, who was with him on the morning of his death, said: "I knew Mark L. Mehaffey. . . . We lived about two blocks from one another. I telephoned him that morning to come by my house and I got with him about 8:30. . . . We went to the station and he was in my car. . . . He asked me to go with him and eat breakfast. I told him I had had my breakfast. I went to the postoffice and he came to me after he ate his breakfast. He went to Mr. Cain's cafe for breakfast. . . . He walked from the depot to the cafe. It was about ten or fifteen minutes from the time I departed from him at the depot until I met him again. . . . I had come in off my run the day before and left my overalls at the shop. I wanted to get them and carry them to the laundry and he got in the car to go with me to get them. We had to go about one mile from the station to the shop. On the way to the shop I did not notice anything out of the ordinary except he got out of the car and vomited. . . . When I stopped the car he got out of the car and set down on the running board and vomited. . . . After he vomited he got back into the car and I went to the shop and got my overalls. . . . Then I went to Smith's Drug Store. He asked me to stop. . . . I went into the drug store with him and asked Dr. Stowe to give him some medicine and he gave him two doses. He was in the drug store about ten minutes. He seemed to feel better after taking the medicine. . . . I took him to the Mission Hospital. On my way from the drug store to the hospital he made a statement as to his physical condition. He told me if he did not get medical aid from somewhere he was going to die. About ten minutes after he reached the hospital he died."

The coroner testified that he saw the deceased thirty or forty minutes after his death and that he performed an autopsy on the body. He said: "His stomach was red, irritated, congested, and in an inflammatory condition. There was a large amount of black blood and mucous in the stomach." He further testified that heavy drinking would have probably had that effect on the stomach. "I think heavy drinking would have had a tendency to produce the kind of condition I found in his stomach. Drinking would be some substance taken into the stomach."

The keeper of the restaurant in which the deceased ate his breakfast, testified that the deceased drank only buttermilk on the morning of his death. There was no evidence that the buttermilk was deleterious or unwholesome. There was abundant evidence, however, that for sometime prior to his death the deceased had been drinking heavily. A witness said that on the Sunday preceding his death "me and him was together most of the day, riding around. We were both drinking. We were both pretty much drunk." Another associate of deceased testified that on Monday evening before he died on Tuesday the deceased had had two small drinks "of as good a kind of liquor as is made at this time. . . . There is some pretty good liquor yet. He took one drink about eleven o'clock and another about six that afternoon." There was also evidence that on a fishing trip a few days before his death the deceased was under the influence of liquor. He was able to go about and go to bed by himself. The physician at the drug store where the deceased stopped a few minutes before his death, testified that "he appeared to be suffering from cramps in his stomach. I fixed him a dose of soda and pepsin. . . . The pepsin is absolutely harmless. While it may not have done good it could not have done any harm."

Dr. Millender, who was present at the time the autopsy was made by the coroner, testified: "The examination showed that the stomach contained blood. It showed that it contained what we assumed to be buttermilk or those two mixed together uniformly in a dark, purplish material. The stomach showed nothing very definite and striking. It was not very abnormal. It did not appear to have had any corrosive poisonous substance acting upon it. . . . No powerful agent would leave the stomach as unharmed as we found this one." There was no evidence that the deceased had been drinking on the morning of his death and there was no odor of whiskey upon his breath.

The coroner, who was a practicing physician, testified that from the post mortem examination he had an opinion satisfactory to himself as to the cause of the assured's death. Thereupon the court propounded the following question: "You can tell what he died from in your opinion?" and the witness replied: "He died from some poisonous substance taken internally."

The following issue was submitted to the jury: "Did the assured, Mark L. Mehaffey, die from effects resulting directly and exclusively of all other causes from bodily injuries sustained by him solely through external, violent and accidental means, as alleged in the complaint?"

The jury answered the issue "Yes," and upon the verdict judgment was rendered against the defendant for $2,000 indemnity provided in the policy, and the defendant appealed.

Redden & Redden and Shipman & Arledge for plaintiff.
Zeb F. Curtis and John A. Chambliss for defendant.

BROGDEN, J. Was the opinion of the coroner based upon the post mortem examination, that the assured died "from some poisonous substance taken internally" sufficient evidence to warrant recovery upon the policy and ward off a nonsuit?

The evidence discloses that for sometime prior to his death the deceased had been drinking heavily and continuously. There was no evidence that the deceased had taken a drink on the morning of his death, but he had been to a cafe and consumed a glass of buttermilk. All the evidence was to the effect that the buttermilk was wholesome. Shortly after drinking the buttermilk the deceased vomited and went to a drug store where a physician administered pepsin and soda. All the evidence was to the effect that the pepsin and soda were harmless. Thirty minutes thereafter the insured was dead.

The theory advanced by the plaintiff is that the deceased was poisoned either by the buttermilk or the liquor which he had been drinking. An examination of the evidence, however, discloses no evidence of poisoning except the statement of the coroner that in his opinion the insured died from some "poisonous substance taken internally."

The liability clause of the policy of insurance rested upon death or injury "solely through external, violent and accidental means." Therefore, in order to warrant recovery for death in such event, such death must not only be accidental but must be produced by "accidental means."

There is abundant authority for the proposition that death caused by inadvertent poisoning or by taking poison through mistake constitutes "accidental means" within the meaning of clauses similar to the one forming the basis of this suit. The law bearing upon the subject may be found in 13 A. L. R., 657; 14 A. L. R., 784; 41 A. L. R., 363; *Calkins v. National Travellers' Benefit Association,* 204 N. W., 406; *Christ v. Pacific Mutual Life Ins. Co.,* 144 N. E., 161; *Olinsky v. Railway Mail Asso.,* 189 Pac., 835; *Ætna Life Ins. Co. v. Brand,* 265 Fed., p. 6; *U. S. Mutual Accident Asso. v. Barry,* 131 U. S., 121, 33 L. Ed., 66. See, also, *Harris v. Ins. Co.,* 204 N. C., 385. The interpretation of the term "accidental means" is not uniform but in large measure the judicial variability arises from the dissimilarity of facts involved.

The interpretation given in the *Olinsky case, supra,* is as follows: "It may be treated as established by the great weight of authority that an injury is not produced by accidental means . . . where it is the direct, though unexpected, result of an ordinary act in which the insured intentionally engages." The *Barry case, supra,* states the principle in these words: "That, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

Upon consideration of these authorities and others of like import, it seems that "accidental means" implies "means" producing a result which is not the natural and the probable consequence of such means. If the result, although unexpected, flows directly from an ordinary act in which the insured voluntarily engages, then such is not deemed to have been produced by accidental means.

Applying the accepted principles of law to the facts, it does not appear that the deceased took poison by mistake or through inadvertence. Assuming that there was evidence of poison in his stomach after death, there is no evidence that it got there through accidental means. Indeed, the facts and circumstances disclose without equivocation that any poison in the stomach of deceased was the natural and probable consequence of an ordinary act in which he voluntarily engaged. Hence no recovery can be sustained and the motion for nonsuit should have been allowed.

Error.

CLARKSON, J., dissenting: The complaint alleges that the assured, Mark L. Mehaffey, on 22 July, 1930, and while the policy sued on was in full force and effect, died from effects resulting directly and exclusively of all other causes, from bodily injuries sustained by the insured solely through external, violent and accidental means, to wit: "By the accidental drinking of poisonous fluid or liquids which caused him to be continually disabled, and which resulted fatally within a few hours thereafter." The plaintiff offered in support of this allegation the evidence of P. E. Smith, who was with him on the morning of his death: Mehaffey went to McCain's Cafe for breakfast, he walked from the depot to the cafe. It was about 10 or 15 minutes before Smith entered, and took him to the hospital where he died about ten minutes later. The evidence of this witness was to the effect that the deceased took a spell of vomiting which lasted about ten minutes. Smith then at the request of the deceased took him to Smith's Drug Store in Asheville, where he was given soda, pepsin, and then ammonia. Smith started home with him, and Mehaffey then told him that if he did not get some medical treatment somewhere he was going to die. He then took him to Mission Hospital, and while in the dispensary in the hospital, he stated to the witness that his hands were getting stiff and numb and that he could not see. Dr. W. E. Baker, who was found by the court to be a medical expert, and who was at the time the coroner of Buncombe County, testified that he saw the deceased some thirty or forty minutes after his death, had the body removed to Clayton and Hyer's and there performed an autopsy. The witness testified "The stomach was red, irritated, congested, and in an inflammatory condition. There was a large amount of black blood and mucous in the stomach. His heart was normal as to any examination as far as I could tell. Q. From your examination as a practicing physician and from the examination you made of his stomach and other organs you examined, have you an opinion satisfactory to yourself as to the cause of the assured's death? A. Yes. Q. What is your opinion? A. He *died from some poisonous substance taken internally.*" The witness testified further: "*I don't know that I know of any other cause or reason that would cause that condition of the stomach than the reasons I have just related.* Q. You mean what other would cause that condition? A. *I don't know of any other.* I think a microscopical examination of that condition I have just outlined would be a very much more thorough way of examining than the examination I made. I don't know that it would be very decidedly more determinative." This in substance is the evidence chiefly relied upon by the plaintiff to sustain the above quoted allegation of the complaint.

The judgment of the court below is as follows: "This cause coming on to be heard and being heard before the undersigned judge holding the courts of the Eighteenth Judicial District and a jury at the March Term, 1932, of Henderson County Superior Court, and the following issue having been submitted to a jury: 'Did the assured Mark L. Mehaffey die from effects resulting directly and exclusively of all other causes from bodily injuries sustained by him solely through external, violent and accidental means, as alleged in the complaint?' And the jury having answered the issue 'Yes' and it appearing from the policy sued on that upon the issue as answered by the jury, the plaintiff is entitled to judgment for the sum of $2,000 with interest from 10 February, 1931. It is, therefore, on motion of counsel for the plaintiff, ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of $2,000 and interest on $2,000 from 10 February, 1931. It is further ordered that the defendant be taxed with the cost of this action."

It is the well settled rule of practice and accepted position in this jurisdiction, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Pearson v. Sales Co.,* 202 N. C., 20.

In *Denny v. Snow,* 199 N. C., at p. 774, we find: "A verdict or finding must rest upon facts proved, or at least upon facts of which there is substantial evidence, and cannot rest upon mere surmise, speculation, conjecture, or suspicion. There must be legal evidence of every material fact necessary to support the verdict or finding, and such verdict or finding must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities. 23 C. J., pp. 51-52."

The only material question involved in this case is whether there was sufficient competent evidence, more than a scintilla of evidence to be submitted to a jury? I think so. The learned judge in the court below thought so and twelve jurors found the fact. The facts necessary to support a verdict can be shown by circumstantial as well as direct evidence. Plaintiff's husband, Mark L. Mehaffey was a locomotive fireman, employed by the Southern Railway Company. The action is brought by plaintiff, the beneficiary, in an insurance certificate issued "under the terms and conditions of Group Accidental and Health Policy No. 275 covering certain employees of the Southern Railway Company." The material clause is as follows: "Against (1) the effect resulting directly and exclusively of all other causes from bodily injuries sustained by the insured, solely through external, violent and accidental means (excluding suicide or any attempt thereat while sane or insane)," etc. There is no evidence on the record of suicide.

In Vol. 5, Couch Cyc. of Ins. Law, part sec. 1136, p. 3958, is the following: "A large number of cases also involve the clause, 'external, violent, and accidental means.' Under this provision the injury must be external, violent, and accidental, but the degree of violence is immaterial. An unnatural death, the result of accident of any kind, imports an external and violent agency as the cause within the meaning of an insurance policy limiting recovery to death caused through 'external, violent, and accidental means.' . . . (Part sec. 1141, at p. 4003.) There are also numerous cases of death or disability incident to the partaking of food or drink, and resulting either from poisoning or from disease. In the case of death or disability resulting from the mechanical action of food or drink, the cases are largely agreed that it was by accident or the result of accidental means. And the authorities agree that death directly from poisoning following the unintentional eating of bad, but apparently wholesome, food, is affected by accident, or is the result of accidental means, unless causes of such a character are expressly excepted."

In 14 R. C. L., part sec. 427, at p. 1249, we find: "It has been said that unnatural death, the result of accident of any kind, imports an external and violent agency as the cause within the meaning of an insurance policy limiting recovery to death caused through 'external, violent, and accidental means.'" *Zurich General Accident and Liability Ins. Co. v. Mrs. S. A. Flukenger,* 68 A. L. R., 161.

Dr. Charles W. Millender (a medical expert), a witness for defendant, on cross-examination, testified: "I was examined at the coroner's inquest. I made this statement: 'I can state to the jury what in my opinion is the cause of death. After the examination I have seen made and made myself, I arrived at the conclusion *that his death was attributable to a poisonous substance taken internally.* It must be understood that this is an opinion in light of the clinical evidence and the post mortem changes that I observed."

The court below gave an able and exhaustive charge on every aspect of the case and charged the law applicable to the facts. The contentions on both sides were fairly left to the jury. The outline is as follows: "The plaintiff contends that the deceased died from eating or drinking something that poisoned him, and that it was done accidentally. The defendant denies that, says that the deceased came to his death not by eating or drinking something that poisoned him, but by any sudden taking into his system of milk, or drink of liquor, poisonous food or any substance that poisoned or killed him, but that he died a natural death. The defendant contends that death was prematurely brought on because of the dissipations he underwent, because of the way he lived, and conducted himself, the amount of liquor he consumed over a period of time. The plaintiff says that you should find from the evidence that the assured met his death solely through external, violent and accidental means, that he drank or ate something and that that poisoned him and that he died from it within a short time. The defendant says that when you consider all the testimony, that you should not find that to be the case, but that you should find that he died prematurely, but that the death was brought on by the way he lived, that he was not poisoned that morning; that you should not find the buttermilk was poisoned; that you should not find that anything poisoned him that morning, but that you should find that for several days prior to his death he had been dissipating and that his system gradually gave way and was undermined by what he drank, and that the organs of his body failed to function and that he died; that you should not find that this was under the terms of the policy, solely through external, violent and accidental means."

I think there was sufficient competent evidence more than a scintilla to be submitted to the jury, the probative force was for them. This Court has only "jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference." Art. IV, sec. 8, Const. of N. C. I think the judgment of the court below should be upheld.

Z. V. CRUTCHFIELD, CRUTCHFIELD & SINK, HALL & HIGGINS, D. A. WALSER AND D. L. PICKARD, CEMETERY, D. O. CECIL, CENTRAL OIL COMPANY, G. V. BODENHEIMER, P. E. PARKER, HAROLD PARKER, J. N. McCRARY, N. D. CLEMMONS, JESSE A. WADE, W. M. JORDAN, C. E. KEPLEY, GEORGE FINCH, DOAK FINCH, MRS. G. H. YOW, UNITY CHAPEL, W. S. LONG, FIRST NATIONAL BANK OF THOMASVILLE, MORTGAGEE, MRS. ESSIE LASSITER, HIGH POINT GROCERY COMPANY, AND SOUTHERN OIL COMPANY, v. THE CITY OF THOMASVILLE.

(Filed 10 January, 1934.)

Muncipal Corporations G h — Irregularities in procedure for levying assessments for street improvements may be cured by validating act.

Where an incorporated town, under authority of N. C. Code (Michie), 3846(ff), levies an assessment against abutting property owners for street improvements in paving a strip on either side of a State highway running through the town, but such levies are made without a petition of the abutting owners as prescribed by C. S., 2707, the assessments are invalid but not void, and the Legislature has the power to validate the assessments by subsequent legislative act, the Legislature having had the power to authorize the assessments in the first instance.

APPEAL by defendant from *Stack, J.*, at February Term, 1933, of DAVIDSON. Reversed.

The following is the agreed statement of facts:

"For the purpose of determining the matters in controversy in the above captioned case, it is agreed that the following shall constitute an agreed statement of facts:

1. That the city of Thomasville is a municipal corporation, organized, created and existing by virtue of the acts of the Legislature, as set out in the answer; that said city has more than 3,000 inhabitants according to the U. S. census and a considerable part of the streets of the said city had been paved and hard surfaced previously to the paving referred to in the complaint.

2. That for many years prior to 1915 the street referred to in the complaint as the National Highway was known as Unity Street and several years prior to 1928 the said street was taken over by the Highway Commission and it had constructed as a connecting link State Highway No. 10 from the city of High Point to College Street in the city of Thomasville a highway 30 feet in width from the northern limits of the city of Thomasville, 18 feet of said highway being paved with concrete, and the remaining portion of said highway consisting of dirt shoulders, without any portion of the costs of the construction of said length of highway being assessed against any of the abutting property owners; that in 1928 said highway No. 10 from the city of Greensboro to the corporate limits of Thomasville was widened to a width of

40 feet, 30 feet of which was paved and the remainder thereof consisting of dirt shoulders. That in said city of Thomasville where said National Highway No. 10 intersects with East Main Street in said city that said pavement from that point varies in width from 24 to 46 feet to the westward city limits of the city of Thomasville and then State Highway No. 10 consists of a highway 30 feet in width from the westward city limits of the city of Thomasville running to the city limits of Lexington, N. C., 18 feet of said highway being paved with concrete and the remaining portion consisting of dirt shoulders.

3. That on 30 April, 1928, the city of Thomasville and the State of North Carolina, through its Highway Commission, entered into a contract, a copy of which is attached to the complaint and is made a part thereof as fully as if herein set out and reiterated.

4. At a meeting of the city council, upon motion of R. L. Pope, and seconded by Z. V. Crutchfield, the following ordinance or resolution was duly enacted: 'Resolution providing for public improvements—be it resolved by the city council of the city of Thomasville:

That whereas, the State Highway Commission has by agreement contracted to construct a pavement 30 feet wide along State Highway Route No. 10 from College Street, in the city of Thomasville, north to the corporate limits thereof and has found it necessary to connect the State highway with the improved streets of said city uniform in dimensions and materials; and

Whereas, the State Highway Commission did, on 30 April, 1928, by virtue of section 16 of the State Highway Act, make and enter an order declaring the said street to be an assessment district and directing the improvements hereinafter set forth to be made.

Now, therefore, pursuant to such an order, it is resolved that the street or streets to be improved are as follows: North Main Street from College Street to National Highway; National Highway from North Main Street to the corporate limits, and that the improvements to be made therein or thereon are as follows:

A. That pavement be laid or constructed on either side of the 30-foot strip of pavement to be constructed by the State Highway Commission, such additional pavement, including curb and gutters, with provisions for surface drainage, as will make the total paved width of said streets, from curb to curb, forty feet; and such additional pavement is to be of the same kind, character and specifications as that portion to be constructed by the State Highway Commission:

B. That a water main of adequate size be laid on said street or streets or parts thereof as above described and that the necessary laterals be laid for the proper connections with the abutting property with said water main.

C. That there be laid on said street or streets, or part or parts thereof, as above described, such surface or storm sewers as shall be required for the necessary surface drainage.

D. That the said street or streets are hereby declared to be a special assessment district and the entire cost of such improvements are to be assessed against the lots and parcels of land abutting on said street or streets according to their respective frontage thereon, by an equal rate per foot of such frontage, except so much of the paving laid at street intersections, which portion is to be paid for by the city.

E. Said assessments will be payable in ten equal annual installments, which installments will draw interest at the rate of 6 per cent, per annum, from the date of confirmation of the assessment roll; provided, that any such assessment may be paid in full, in cash, without the additional interest, within 30 days from the date of publication of notice of the confirmation of the assessment roll.

The foregoing resolution was adopted by the city council of the city of Thomasville, pursuant to the authority above set forth, on 16 June, 1928. B. H. Harris, city clerk.'

5. That the said ordinance or resolution, as enacted, was duly published in the *News and Times,* a newspaper published in the city of Thomasville, in its issue bearing date of Thursday, 21 June, 1928, and pursuant to such ordinance or resolution, the city council of the city of Thomasville declared the National Highway abutting the property of the plaintiffs a special assessment district and assessed against the property of the plaintiffs abutting on such highway according to their respective frontage thereon by an equal rate per foot of such frontage, except so much of the paving laid at street intersections, which portion was to be paid by the city.

6. That during the month of July, 1928, the defendant, pursuant to the contract above referred to and the ordinance or resolution duly enacted, paved the said National Highway to a width of 40 feet and assessed against the abutting property owners the cost thereof, the additional 5 feet on each side of the said 30 foot paved road according to their front feet abutting thereon.

7. That the amount assessed against the property of the owners, as referred to in paragraph 3 of the complaint, are admitted to be correct.

8. It is admitted no petition of abutting property owners was filed asking for this assessment district to be made, and the city declared the assessment district, pursuant to the ordinance above referred to and made advertisement thereof and assessed the cost of said pavement or improvement against the lands of the plaintiffs, as above referred to, in accordance with their respective frontages.

9. That no condemnation proceeding was instituted by the town for the purpose of acquiring title to the lands against which the street improvement was made.

10. That the defendant published a notice dated 23 July, 1930, requiring all persons interested in said assessment involved in this action to appear before the city council on 4 August, 1930, at 7:30 p.m., and offer any allegations and objections to said assessment; that the plaintiff, G. V. Bodenheimer, Z. V. Crutchfield and possibly some of the other plaintiffs appeared, but made no objection or complaint to the confirmation of the assessment roll.

11. That the following plaintiffs made the following payments on said assessments, namely: Crutchfield and Sink, $24.00; Z. V. Crutchfield, $92.76; High Point Grocery Company, $26.81; Mrs. G. H. Yow made a payment of, $31.76 upon condition a prior assessment of $166.93 be not enforced against her, but all of said amounts were paid without protest, and after other property owners were contesting the validity of this assessment that the said sums were paid more than 90 days prior to the institution of this action and no claim or demand has been made upon the defendant for the return of the same before the institution of this action.

12. That at the time this contract was entered and the ordinance passed creating the said assessment district and the construction of the pavement made, chapter 224 of the Private Laws of North Carolina of the Session of 1927, was in force and effect.

13. That since the entering into said contract, the passage of the ordinance creating the assessment district and assessing the property owners with the cost of the assessment, the construction of the said pavement and the payments made on the amounts assessed against the property of the plaintiff, chapter 196 of the Private Laws of North Carolina of the Session of 1929, has been enacted. Section 58, paragraph A thereof being as follows: 'That any and all proceedings heretofore taken by the city of Thomasville in the paving or repairing of its streets and sidewalks and for the levying of special assessments thereof are hereby approved, legalized and validated,' etc.

14. That section 68 of the said chapter 196 of the Private Laws of Session of the Legislature of 1929, provides as follows: 'That no action shall be instituted or maintained against the city of Thomasville upon any claim or demand whatever of any kind or character until the claimant shall have first presented, in writing, his or her claim or demand to the council of the said city and said council shall have declined to pay or settle the same, as presented, or for ten days after such presentation shall have neglected to enter or cause to be entered upon its minutes its determination in regard thereto.'

15. That the time the contract was entered into, the ordinance or resolution passed and the street paved, section 49 of chapter 301 of the Private Laws of the General Assembly of 1915 was in full force and effect, and a part of the charter of the city of Thomasville.

16. That the condition of said streets is correctly shown on blue print dated 26 May, 1931, and is made a part of this agreed statement of facts.

17. That said assessment and improvement was made under and by virtue of section 3846ff of N. C. Code (Michie)."

The judgment of the court below is as follows: "This cause coming on to be heard at the regular February Term, 1933, of the Superior Court of Davidson County before his Honor, Judge A. M. Stack, judge presiding, and a jury, and the parties having expressly waived a jury trial and agreed upon the following statement of facts to be found by the court (a copy of said findings of fact which are hereto attached and made a part of this judgment as if written herein) and having agreed that his Honor could render judgment upon the admissions in the pleadings and the said statement of facts; now, therefore, his Honor being of the opinion that upon the admissions in the pleadings and the attached statement of facts the assessment levied by the city of Thomasville is null and void and the same is set aside and declared null and void, and the said city of Thomasville is perpetually enjoined and restrained from collecting the assessments and the amounts which are assessed against the plaintiffs in this action as contained in allegation 3 of the complaint which was admitted in the answer, and that the defendant pay the costs of this action to be taxed by the clerk."

Defendant excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

Don A. Walser for plaintiffs.
H. R. Kyser for defendant.

CLARKSON, J. The plaintiff relies on *Sechriest v. Thomasville,* 202 N. C., 108, to sustain the judgment of the court below, but on the facts appearing in the present case, we cannot so hold.

In that case the protesting property holders appeared before the governing body and a decision was rendered against them. Pursuant to C. S., 2714, they appealed. "To the making of the above assessments each of the parties above named assessed excepted and appealed to the Superior Court of Davidson County." In the Superior Court in the *Sechriest case, supra,* a judgment was rendered for plaintiffs, which, in part, is as follows: "It is admitted that the pavement of the State highway outside of the city limits is only thirty feet, exclusive of dirt shoulders, and that the pavement of that portion inside the city limits involved in this controversy is 40 feet. . . . That chapter 301, section 49, Private Laws, 1915, is in full force and effect as a part of charter of city of Thomasville. That said assessment and improvement is made under and by virtue of section 3846(ff) of N. C. Code (Michie). Now, therefore, his Honor being of the opinion that upon the admissions in the pleadings and the foregoing statement of facts the assessment levied by the city of Thomasville, is invalid, the same is set aside, and declared null and void, and said city of Thomasville is perpetually enjoined and restrained from collecting said assessments." The city of Thomasville appealed to this Court and the judgment of the court below was affirmed. The main contention of plaintiffs in that case is that there was no petition. This Court said in the *Sechriest case, supra,* at p. 112 and 113:

"The sole question involved in this action: Is an assessment by a city against the abutting property owners on each side of the street widened, improved or surfaced to extent of five feet extra under a contract with the State Highway Commission, by virtue of N. C. Code, 1931 (Michie), sec. 3846(ff), invalid on account of the five feet on each side of such street widened, improved or surfaced, within the corporate limits, not being uniform in width with the improved or surfaced portion of the State highway outside of the corporate limits; no petition for the extra five feet to be improved or surfaced having been obtained from the majority in number of the abutting property owners, in accordance with C. S., chap. 56, Art. IX, sec. 2707? Under the facts of this case, we think the assessment invalid." Plaintiffs, in the present action, were given notice, some did and some did not appear and appeal, as was done in the *Sechriest case, supra,* but bring this separate action, instituted 24 March, 1932.

In the *Sechriest case, supra,* at p. 114, we said: "Plaintiffs, in contesting this matter, pursued the statutory remedy. *Jones v. Durham,* 197 N. C., at p. 133." This Court said in that case "We think the assessment invalid." In the present case, can that invalidity be cured? We think so.

In *Holton v. Mocksville,* 189 N. C., 144 (p. 149), we find: "Defendant offered in evidence chapter 86, Private Laws, 1923, entitled 'An act relating to the financing of street and sidewalk improvements in the town of Mocksville.' This act provides that 'the said board of commissioners (of the town of Mocksville) shall have power to levy special assessments as herein provided (*i. e.,* without petition as required by C. S., 2706), for or on account of street and sidewalk improvements now in progress or completed within two years prior to the ratification of this act. All proceedings heretofore taken by the board of commissioners of said town for the levying of special assessments are hereby legalized and validated.' This act was ratified on 23 February, 1923. The improvements for the payment of which the assessments involved in this action were made, were completed in February, 1922. This act is sufficient in its terms to cure the defect in the proceeding and to legalize and validate the assessment. . . . (p. 150.) Nor can the act be successfully attacked because it is retroactive or retrospective. The General Assembly having the power in the first instance to confer upon the authorities of a municipal corporation power to improve its streets and sidewalks and to assess the owners of abutting property with a part of the cost of such improvements without a petition, has the power to validate proceedings for the improvement of streets and sidewalks which were begun and which have been concluded without an initial petition. This power has been recognized and its exercise approved as within the constitutional authority of the General Assembly by this Court," citing a wealth of authorities.

In *Gallimore v. Thomasville,* 191 N. C., 648 (652-3), we find: "Between the date on which plaintiffs appealed from the assessments made on their lands, and the trial of this appeal in the Superior Court, chapter 217, Private Laws, 1925, was enacted by the General Assembly. This act provides 'that any and all acts heretofore done and steps taken by the city of Thomasville in the paving of the streets of the city of Thomasville and the assessments levied therefor are hereby in all respects approved and validated.' Defendant was permitted by the court to amend its answer to the protest of plaintiffs, and to plead this act in support of the validity of the assessments. Conceding that there were defects and irregularities in the proceedings under which the assessments were levied, sufficient to render said assessments invalid, as contended by plaintiffs, it must be held, under the authority of *Holton v. Mocksville,* 189 N. C., 144, that said assessments are now valid, by virtue of said act, provided the act itself is valid. . . . The power of the General Assembly to enact such statutes has been repeatedly and uniformly upheld. *Holton v. Mocksville,* 189 N. C., 144; *Brown v. Hillsboro,* 185 N. C., 375. The principle that when there are defects and irregularities in a proceeding duly authorized by the General Assembly, due to an inadvertent violation or nonobservance of statutory provisions, for the conduct of such proceedings, the General Assembly may correct the defects and cure the irregularities, and thus validate the proceeding, by proper legislative action, provided no vested rights have supervened, has been very generally recognized. *Kinston v. Trust Co.,* 169 N. C., 207; *Reid v. R. R.,* 162 N. C., 355." *Comrs. v. Assel,* 194 N. C., 412 (418); *Barbour v. Wake County,* 197 N. C., 314 (318); *Greene County v. R. R.,* 197 N. C., 419 (423); *Efird v. Winston-Salem,* 199 N. C., 33 (37).

In the present case, the facts agreed upon (13) is as follows:

"That since the entering into said contract, the passage of the ordinance creating the assessment district and assessing the property owners with the cost of the assessment, the construction of the said pavement and the payments made on the amounts assessed against the property of the plaintiff, chapter 196 of the Private Laws of the State of North Carolina of the Session of 1929 has been enacted. Section 58, paragraph A thereof being as follows:

'That any and all proceedings heretofore taken by the city of Thomasville in the paving or repairing of its streets and sidewalks and for the levying of special assessments thereof are hereby approved, legalized and validated. . . .'" (See Private Laws, 1933, chap. 128, sec. 2.)

The act, although a little broad, yet it approves, legalizes and validates the levying of special assessments and comes within the *Holton* and *Gallimore cases, supra. Houck v. Hickory,* 202 N. C., 712, is easily distinguishable.

Perhaps confusion arose as in the latter part of the opinion in the *Sechriest case* the language used "is invalid, null, and void." In the prior part of the opinion it was distinctly said "under the facts in this case, we think the assessment invalid." This invalidity was cured by the special act which said: "special assessments thereof are hereby approved, legalized, and validated." This case is distinguishable from *Charlotte v. Brown,* 165 N. C., 435, *Flowers v. Charlotte,* 195 N. C., 599. In those cases the assessment was "void," in the present case "invalid" and could be resuscitated by legislative enactment.

Reversed.

IN THE MATTER OF MARY E. OSBORNE, MINOR CHILD OF MRS. BERTHA POCUS.

(Filed 24 January, 1934.)

1. **States A b—Where court of another state has jurisdiction of action its judgment must be given full faith and credit in this State.**

   Where the courts of another state have jurisdiction of the parties and subject-matter, its judgment in the cause is not subject to collateral attack in this State, but such foreign judgment will be given full faith and credit under Art. IV, sec. 1, of the Federal Constitution.

2. **Judgments M c—Foreign judgment is not subject to collateral attack where foreign court has jurisdiction of cause.**

   The validity of a judgment of another state decreeing adoption by petitioner of a minor child may not be collaterally attacked in proceedings in this State on the ground that the parents' consent to the adoption was not obtained, and that therefore the foreign court did not obtain jurisdiction, where it appears that the child's father had abandoned it and that its mother had given her written consent in accordance with the procedure of such other state, and that the foreign court was given jurisdiction to decree adoption in such cases according to its laws, the laws of such other state being controlling in the matter.

3. **Adoption B c—Parent by adoption has right to custody of child as against its natural mother.**

Where a child has been legally adopted, its parent by adoption is entitled to a decree for its custody in *habeas corpus* proceedings as against its natural mother even though it is found by the court that it would be to the best interest of the child to award its custody to its natural mother.

APPEAL by respondent, Mrs. Anna Harrell, from *Sinclair, J.*, at Chambers, Fayetteville, N. C., 29 September, 1933. From PENDER. Affirmed.

This was a writ of *habeas corpus* brought by Mrs. Bertha Pocus for the custody of Mary E. Osborne, a minor child whose mother was Mrs. Anna Harrell. The petitioner, Mrs. Bertha Pocus, contends that she adopted the child in 1922 when an infant about 2½ months old. That the adoption was at Roanoke, Va., in accordance with the laws of Virginia. That the mother, Mrs. Anna Harrell, consented to the adoption. The petition that she signed for Mrs. Bertha Pocus (Mrs. W. B. Osborne—W. B. Osborne is dead and she married Mr. Pocus) to adopt the child has this in it:

"Mrs. Anna Bowen (now Mrs. Anna Harrell) the mother of said Mary E. Bowen, having been deserted without just cause by W. L. Bowen, her husband, about six months ago, the whereabouts of her said husband being now unknown to her, she, the said Mrs. Anna Bowen, enters in the prayer of this petition for the purpose of giving her written consent to the adoption of said infant, and that they, the said petitioners, desire to have the name of the said Mary E. Bowen changed to Mary E. Osborne."

In the judgment is the following:

"The father, without cause, having deserted his wife and child about six months ago."

That she kept and provided for the child until early in 1933, when Mrs. Harrell, the mother, came to see her and asked to take the child to Bluefield, W. Va., for two week's visit. That she never brought the child back, but moved to Pender County, North Carolina, with the child to live and refused to surrender the custody of the child.

In the record is the following:

"By consent, attorneys for the petitioner and respondent, agree that the following shall be and constitute the record in the above case on appeal:

"Petition for writ of *habeas corpus*, writ of *habeas corpus*, answer of Mrs. Anna Harrell, reply of petitioner, judgment of Superior Court, adoption proceedings, section 5333 of the Virginia Code, *Bell v. Jones*, 90 Va. Law Register, 1070, affidavits in support of petition, affidavits in support of respondent's answer."

The judgment of the court below was as follows:

"This cause coming on to be heard upon a writ of *habeas corpus* before the undersigned judge of the Superior Court and being heard upon the petition, answer and affidavits filed, upon consideration thereof and after argument of counsel the court finds as a fact that it would be to the best interest of the infant, Mary E. Osborne, to award her to the care and custody of her mother, Mrs. Anna Harrell; but the court being of the opinion as a matter of law that the said Mary E. Osborne was legally adopted by the petitioner, Mrs. Bertha Pocus, under and by virtue of a valid judgment of a court of competent jurisdiction of the State of Virginia, prior to the institution of this proceeding:

It is, therefore, considered, adjudged and ordered that the body of the said Mary E. Osborne be delivered to the care and custody of the petitioner, Mrs. Bertha Pocus.

The hearing in this proceeding was continued from time to time and it was agreed by consent of counsel that judgment might be signed out of the county and out of the district.

Done at chambers, Fayetteville, N. C., 29 September, 1933.

N. A. SINCLAIR, *Judge Superior Court*."

The only exception and assignment of error by the respondent, Mrs. Anna Harrell, was to the judgment as signed.

Clifton L. Moore for appellee.
John J. Best for appellant.

CLARKSON, J. Both sides to this controversy admit that the questions involved are as follows:

1. Was Mary E. Osborne, as a matter of law, legally adopted by the petitioner, Mrs. Bertha Pocus, under and by virtue of a valid judgment of the court of competent jurisdiction of the State of Virginia, prior to the institution of this proceeding?

2. Are such adoption proceedings subject to collateral attack in this proceeding?

3. Who is entitled to the custody of Mary E. Osborne, the lower court having found that her mother, Mrs. Anna Harrell, her natural mother, was the proper person to have her custody, as a matter of fact, and that the petitioner, Mrs. Bertha Pocus, was entitled to her custody as a matter of law?

As to the first question, we think it must be answered in the affirmative and the second in the negative and the third, Mrs. Bertha Pocus.

In *Webb v. Friedberg,* 189 N. C., at p. 171-2, it is said: "Article IV, sec. 1, Const. of U. S., is as follows: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.' *Hanley v. Donoghue,* 116 U. S., 1; *Thompson v. Whitman,* 18 Wall., 457; *Andrews v. Andrews,* 188 U. S., 14; *Haddock v. Haddock,* 201 U. S., 562; Const. of U. S., Anno., 1923, p. 478, *et seq.* 'By virtue of Const. U. S., and acts of Congress in pursuance thereof, judgment of other states are put upon the same footing as domestic judgments; they are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the court.' *Marsh v. R. R.,* 151 N. C., 160; *Miller v. Leach,* 95 N. C., 229." *Van Kempen v. Latham,* 195 N. C., 389-391. *Yarborough v. Yarborough,* U. S. Supreme Court Adv. Opinions, 172. Sup. Court Rep. Vol. 54, p. 181. In 15 R. C. L. (Judgments), page 915, part sec. 394, is the following:

"A judgment of a sister state cannot be impeached by showing irregularity in the forms of proceeding, or a noncompliance with some law of the state where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered. Where there is no want of jurisdiction of the person or subject-matter of the controversy, mere error in the exercise of jurisdiction by a foreign court rendering judgment is immaterial in an action on such judgment, and a foreign judgment founded on a mistake as to the law is nevertheless valid and entitled to full faith and credit. An erroneous construction of a statute or other law of one state by the courts of another affords no ground for denying its judgment, faith and credit. When judicial proceedings of one state are drawn in question before the courts of another state their regularity and validity are to be determined, not according to the laws of the forum, but with reference to those of the state in which the judgment was rendered, and the recognition to be accorded a foreign judgment is not affected by the fact that the procedure in the country in which such judgment was rendered differs from that of the courts of the country in which it is sought to be enforced or relied on." *Ring v. Whitman,* 194 N. C., 544; *In re Chase,* 195 N. C., 143; *S. c.,* 193 N. C., 450; *Bonnett-Brown Corporation v. Coble,* 195 N. C., 491.

The respondent, Mrs. Anna Harrell, relies on the case of *Truelove v. Parker,* 191 N. C., 430, and *In re Shelton,* 203 N. C., 75. These cases are not applicable. The child was adopted according to the law of Virginia and we must give under the U. S. Constitution, Article IV, section 1, "full faith and credit."

The respondent, Mrs. Anna Harrell, contends that, "consent lies at the foundation of the statutes of adoption, and, if they require it being given, the jurisdiction of the subject-matter cannot be acquired without it. Where certain facts obviate the necessity of consent, the existence of those facts must be shown, and a failure to observe the statutory requirement as to notice and consent is not mere irregularities which is immune from collateral attack, but they are jurisdictional and without that a valid order of adoption cannot be made."

We think the court of Virginia had jurisdiction when the adoption was made.

The allegations in the petition for adoption follows the Virginia statute, section 5333 of the Code of Virginia. The pertinent part is as follows:

"But a written consent, duly acknowledged, must be given to such adoption by the child, if of the age of fourteen years or over, and by each of his or her known living parents who is not hopelessly insane or otherwise incapacitated from giving such consent, or who is not habitually addicted to the use of drugs or of intoxicating liquors, *or has not abandoned such child,* or has not lost custody of the child through the order of a court; or if the *parents are disqualified,* as aforesaid, then by the legal guardian, or if there be no such guardian, then by a discreet and suitable person appointed by the court to act in the proceedings as the next friend of such child; but if such parents or guardian join in said petition it shall be deemed such consent in writing.

Upon filing of said petition, the court shall direct a probation officer or other officer of the court, or an agent of the State or county or city board of public welfare, or some other discreet and competent person, to make a careful and thorough investigation of the matter and report his findings in writing to said court. The person so directed to make such investigation shall make inquiry, among other things, as to, etc., . . ."

In *Bell v. Jones,* 9 Virginia Law Reg., 1070, it is there said: "'A judgment of a court fixing the status of a person, rendered in matters where it has jurisdiction and upon the notice required by law, is conclusive as against all collateral attacks by parties or privies.' *Brown v. Brown,* 101 Ind. R., 340; *Van Metre v. Sankey,* 39 Am. St. R., 197."

In the present matter no fraud is alleged and the Virginia court, having jurisdiction, the proceeding in the Virginia court must be given "full faith and credit."

Section 5333, *supra,* further provides: "At any time after the final order of the court permitting such adoption and change of name, the parent or parents of such minor child, the State Board of Public Welfare, or the child itself, if twenty-one years of age, and if not twenty-one years of age, then the child by its next friend or the adopting parent or parents, may petition the court which entered such order of adoption to vacate the same and terminate the adoption and restore the former name."

This is the remedy of the respondent, Mrs. Anna Harrell, if she has any.

Since the *Truelove case, supra,* was decided the General Assembly of North Carolina, Public Laws, 1927, chap. 171, amended C. S., 189. which now reads as follows:

"In all cases where the parent or parents of any child has wilfully abandoned the care, custody, nurture and maintenance of the child to kindred, relatives or other persons, such parent or parents shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child, and upon finding of such fact by the court, *shall not be necessary parties* to an action or proceedings under this chapter; providing, this section shall not prevent the parent from instituting a proceeding under the next section of this chapter."

See North Carolina Code of 1931 (Michie), sec. 189—Abandonment by parents—custody forfeited; sec. 190, Restoration of parent's rights; sec. 190(a), Judgments binding until vacated. This case is controlled not by the statutes and decisions of this State, but according to the laws of Virginia, in which state the judgment was rendered and we must give under the Constitution "full faith and credit" to same.

This is a pathetic case, the love of both women for this child. We have to construe the law, but should not the leaven of goodness so regulate this case that both parties to this controversy may be able to have this child during certain periods of the year. Of course, this has to be done by consent of the parties. For the reasons given, the judgment of the court below is

Affirmed.

CLARENCE E. MITCHELL v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 24 January, 1934.)

1. **Insurance M c :R c—**

Evidence of insured's total disability and submission or waiver of due proof thereof held sufficient to be submitted to the jury.

2. **Insurance R c—Subsequent recovery does not preclude right of action on clause providing for presumably permanent total disability.**

Insured brought action on a clause in a policy of life insurance providing for monthly payments to insured if he should become totally and presumably permanently disabled, and stipulating that disability should be presumed permanent when it had existed for a period of three months, and that when it had existed for such period the effective date for the payment of disability benefits should be one month after continuous disability. Insured proved total disability for a period of sixteen and one-half months, and admitted his complete recovery thereafter. *Held*, insured was entitled to recover disability benefits for the period of disability, it being sufficient for recovery under the policy contract if insured should become totally disabled and such disability be presumably permanent under the provisions of the policy.

3. Insurance E b—

Where an insurance policy is reasonably susceptible of two interpretations, the one more favorable to the insured will be adopted.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1933, of WAKE.

Civil action to recover on a total and presumably permanent disability clause in a policy of life insurance.

Upon the payment of the first annual premium of $471.80, the defendant, on 28 May, 1930, issued to the plaintiff a $10,000 life insurance policy, containing, among other things, the following provisions:

"And further, if the insured before age 60 becomes totally and permanently disabled as defined in the total and permanent disability provision on the third page hereof, the society will, subject to the conditions of such provision, waive subsequent premiums and pay to the insured a disability income of one hundred dollars a month."

The provisions on the third page of the policy, referred to in the above clause, are as follows:

"Definition: For the purpose of this policy: (A) Disability is total when it prevents the insured from engaging in any occupation or performing any work for compensation of financial value, and (B) total disability is presumably permanent . . . (2) When it has existed continuously for three months—then from the date of the expiration of such three months."

Attached to the policy is a rider which provides:

"It is hereby agreed that when total disability has existed continuously for three months it will be regarded by the society as presumably permanent from the date of completion of one month of continuous total disability (herein called the effective date) notwithstanding subparagraph (2) of paragraph (B) of the provision for total and permanent disability benefits."

This suit was instituted 1 October, 1932, and the jury has found from the evidence offered on the hearing that the plaintiff, who is 46 years old, became totally disabled, within the meaning of the policy and while it was in force, on 1 January, 1931, which total disability continued until 15 May, 1932; that due proof of such disability was submitted to the defendant by the plaintiff as required by the terms of the policy; and that plaintiff was entitled to recover according to the terms of the presumably permanent disability clause.

Defendant appeals, assigning errors.

J. M. Broughton for plaintiff.
S. Brown Shepherd for defendant, and Charles U. Harris of counsel.

STACY, C. J. It may be observed *in limine* that while the evidence on the issue of plaintiff's total disability from 1 January, 1931, to 15 May, 1932, and the submission or waiver of due proof thereof, is somewhat equivocal, nevertheless it is sufficient to carry the case to the jury so far as these questions are concerned. *Green v. Casualty Co.,* 203 N. C., 767, 167 S. E., 38; *Bulluck v. Ins. Co.,* 200 N. C., 642, 158 S. E., 185; *Metts v. Ins. Co.,* 198 N. C., 197, 151 S. E., 195; *Brinson v. Ins. Co.,* 195 N. C., 332, 142 S. E., 1; *Fields v. Assurance Co.,* 195 N. C., 262, 141 S. E., 743; *Lee v. Ins. Co.,* 188 N. C., 538, 125 S. E., 186; *Buckner v. Ins. Co.,* 172 N. C., 762, 90 S. E., 897; *Taylor v. Ins. Co.,* 202 N. C., 659, 163 S. E., 749; *Gerringer v. Ins. Co.,* 133 N. C., 407, 45 S. E., 773.

The defendant stressfully contends that whatever presumption of permanency of the disability may have existed prior to 15 May, 1932, it was clearly rebutted on that date by the plaintiff's recovery, and that his subsequent continued good health demonstrates it was only temporary and is therefore a bar to the present action. *Grenon v. Ins. Co.,* 52 R. I., 456. It will be readily conceded that the position of the defendant in this respect is unassailable, if the policy in suit only insures against disability which is both total and permanent. *Ginell v. Prudential Ins. Co.,* 237 N. Y., 554; *Ins. Co. v. Blue,* 222 Ala., 665; *Hawkins v. Ins. Co.,* 205 Ia., 760; *Shipp v. Ins. Co.,* 146 Miss., 18; *Brod v. Ins. Co.,* 253 Mich., 545; *Job v. Ins. Co.,* 22 (2d) Pac., 607.

But as we understand the clause in question, it insures the plaintiff not only against disability which is both total and permanent, but also against disability which is total and presumably permanent; and then defines what is meant by "presumably permanent." The rider attached to the policy provides that "when total disability has existed continuously for three months it will be regarded by the society as presumably permanent from the date of completion of one month of continuous total disability." Thus, the meaning of the policy is defined by its own terms, and it goes beyond total and permanent disability. *Bagnall v. Travelers' Ins. Co.,* 296 Pac. (Cal.), 106; *Dietlin v. Ins. Co.,* 14 Pac. (2d) (Cal.), 331; *Penn Mut. Life Ins. Co. v. Milton,* 160 Ga., 168, 127 S. E., 140, 40 A. L. R., 1382.

In this respect, the case of *Kurth v. Continental L. Ins. Co.,* 211 Iowa, 736, 234 N. W., 201, is practically on all-fours with the one at bar, and in dealing with the expression "presumably permanent," the Court said:

"As said before, the contingency insured against is: that the insured has been wholly disabled for a period of not less than 60 days, and that such disability so suffered is *presumably* permanent, and that he will be wholly and continuously prevented thereby from pursuing any gainful occupation. . . .

"The fact is that the use of the word 'presumably' in connection with 'permanent' is sufficient to destroy the idea that it was intended that the absolute certainty of the permanency and the absolute certainty of the continuance of the disability should prevail. The word 'presumably' is a comparative adverb, as used in this instance, and by its very nature precluded the idea of an absolute, lasting, or fixed condition. Its meaning is: fit to be assumed as true in advance of conclusive evidence; credibly deduced; fair to suppose; by reasonable supposition or inference; what appears to be entitled to belief without direct evidence. Webster's New International Dictionary. By the employment of this word 'presumably,' it is clear that there might be some question, at present or in the future, concerning the permanency and continuancy of the described disability. . . . The words, 'permanently' and 'continuously,' standing alone, would imply that the disability was a lasting and absolutely fixed condition; but when these words are taken in connection with the language used in other provisions of the contract, the only fair construction to be placed on such words is, not that the disability which has existed during 60 days must exist forever, but that such disability has existed for a period of not less than 60 days and by a fair presumption will continue for a future period. . . .

"It must, therefore, be held, as a matter of law, that the insured, under this contract, was required to furnish proofs only of the fact that he had been wholly disabled by bodily injury or disease for a period of not less than 60 days, and that such disability is presumably permanent, and that he will be presumably wholly and continuously prevented thereby from pursuing any gainful occupation."

The jury has found that the plaintiff was totally disabled from 1 January, 1931, to 15 May, 1932. Therefore, under the terms of the policy, when such disability exists continuously for three months, it is regarded as presumably permanent from the "effective date," and plaintiff is entitled to recover for such period. Totality of disability plus presumption of permanency is as much within the terms of the policy as total and permanent disability.

Speaking to somewhat similar provisions in the two policies before the Court in *Dietlin v. Ins. Co., supra, Spence, J.,* delivering the opinion, said:

"The presumption in the present case is not a creature of statute but is found in the agreement of the parties. We cannot assume that the parties merely intended that the presumption should be rebuttable. It is more logical to assume from a reading of all of the disability provisions of the life policies that the parties intended, by creating the presumption, to definitely set at rest the question of whether a total disability continuing for not less than three months should be treated as 'permanent' within the meaning of the policies. While the clauses preceding indicate that the disability must be such as to 'prevent the insured then and at all times thereafter from engaging in any gainful occupation,' the clauses following clearly indicate that the company intended to assume liability in some cases until 'it appears that the insured has recovered so as to be able to engage in any gainful occupation.' The preceding clauses indicate the necessity of absolute permanency in order to render the company liable in any case while the clauses following indicate that absolute permanency is not always required. In between stands the clause in question, whereby the parties agreed that total disability existing continuously for not less than three months should be presumed to be 'permanent' within the meaning of the policies. We believe that a reading of all of these clauses indicates that the parties intended to create a conclusive rather than a rebuttable presumption to apply so as to entitle the assured to the disability benefits during the entire period that such total disability might continuously exist. At any rate these life policies issued by the company are reasonably subject to such construction and under the settled rule, any doubt or uncertainty must be resolved in favor of the assured."

Our own decisions are in full accord with the last sentence contained in the above quotation. *Bray v. Ins. Co.,* 139 N. C., 390, 51 S. E., 922; *Grabbs v. Ins. Co.,* 125 N. C., 389, 34 S. E., 503. If an insurance contract be reasonably susceptible of two interpretations, the courts will adopt the one more favorable to the assured. *Conyard v. Ins. Co.,* 204 N. C., 506, 168 S. E., 835. "The policy having been prepared by the insurers, it should be construed most strongly against them." *Bank v. Ins. Co.,* 95 U. S., 673; *Jolley v. Ins. Co.,* 199 N. C., 269, 154 S. E., 400; *Underwood v. Ins. Co.,* 185 N. C., 538, 117 S. E., 790.

A careful perusal of the entire record leaves us with the impression that the judgment should be affirmed. It is so ordered.

No error.

CLARENCE E. MITCHELL v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 24 January, 1934.)

1. **Insurance M c: R c—**

Evidence of insured's total disability and submission or waiver of due proof thereof held sufficient to be submitted to the jury.

2. Insurance R c—Subsequent recovery precludes right of action on clause providing for total permanent disability.

The policy of insurance sued on in this case provided for monthly payments to insured if he should become totally and permanently disabled and provided that disability should be presumed permanent when it had existed for a period of not less than three months, and reserved to insurer the right to require proof of continuance of disability from time to time, the benefits to cease upon termination of disability. Insured proved total disability for sixteen and one-half months and admitted complete recovery thereafter, and brought suit after complete recovery to recover disability benefits for the period of disability. *Held,* insured was not entitled to recover, since the policy covers only total permanent disability, the provision that disability should be presumed permanent after three months being for the benefit of insured to allow payments in cases where doubt exists whether disability is permanent or temporary, and not being intended to create a conclusive or irrebuttable presumption.

3. Insurance E b—

While the courts will construe an ambiguous policy of insurance strictly against the insurer, they cannot enlarge the liability of the insurer beyond the clear provisions of the policy.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1933, of WAKE.

Civil action to recover on a total and permanent disability clause in a policy of life insurance.

Upon receipt of the payment in advance of the first annual premium of $961.25, the defendant, on 28 March, 1922 (rewritten 15 March, 1929), issued to the plaintiff a $25,000 life insurance policy, containing, among other things, the following provisions:

"And further, if the insured becomes wholly and permanently disabled before age 60, the society will waive subsequent premiums and pay to the insured a disability annuity of two hundred fifty dollars a month, subject to the terms and conditions contained on the third page hereof."

The provisions on the third page of the policy, referred to in the above clause, are as follows:

"TOTAL AND PERMANENT DISABILITY.

"(I) Disability benefits before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the insured's age at nearest birthday is 60 years, in which event the society will grant the following benefits:

"(a) Waive payment of all premiums payable upon this policy falling due after the receipt of such proof and during the continuance of such total and permanent disability; and "(b) Pay to the insured a monthly disability-annuity as stated on the face hereof; the first payment to be payable upon receipt of due proof of such disability and subsequent payments monthly thereafter during the continuance of such total and permanent disability. . . .

"Disability shall be deemed to be total when it is of such an extent that the insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months. . . .

"(III) Recovery from disability. The society shall have the right at any time or times during the first two years after receipt of such proof of disability, but thereafter not more frequently than once a year, to require proof of the continuance of such total disability. If the insured shall fail to furnish satisfactory proof thereof, or if it appears at any time that the insured has become able to engage in any occupation or perform any work for compensation of financial value, no further premiums will be waived and no further disability-annuity payments will be made hereunder on account of such disability."

This action was instituted 1 October, 1932, and the jury has found from the evidence offered on the hearing that the plaintiff, who is 46 years of age, became totally disabled from bodily injury or disease, within the meaning of the policy and while it was in force, on 1 January, 1931, which total disability continued until 15 May, 1932; that due proof of such disability was submitted to the defendant by the plaintiff as required by the terms of the policy; and that plaintiff was entitled to recover according to the terms of the total and permanent disability clause.

Defendant appeals, assigning as errors the refusal of the court to sustain its demurrers interposed to the complaint and to the evidence.

J. M. Broughton for plaintiff.
S. Brown Shepherd for defendant, Charles U. Harris of counsel.

STACY, C. J. As was said in the companion case of *Mitchell v. Assurance Society, ante,* 721, while the evidence on the issue of plaintiff's total disability within the meaning of the policy from 1 January, 1931, to 15 May, 1932, and the submission or waiver of due proof thereof, is somewhat equivocal, nevertheless it is sufficient to carry the case to the jury so far as these questions are concerned. *Misskelley v. Ins. Co., ante,* 496, 171 S. E., 862.

But the provisions of the present policy, upon which plaintiff seeks to recover, are different from those appearing in the companion suit, just decided. Here, the disability must be both total and permanent before any recovery can be had. *Brod v. Detroit Life Ins. Co.,* 253 Mich., 545, 235 N. W., 248.

The question then occurs: Can a total disability arising from bodily injury or disease which has lasted for only sixteen and one-half months, and from which the assured has completely recovered prior to action brought, be regarded as a "permanent disability" within the meaning of the policy in suit? It would seem to be a contradiction in terms to say that a disability, admittedly temporary, is to be regarded as permanent. The policy does not protect the plaintiff against a temporary disability. To be compensable, the disability must be both total and permanent. Hence, a temporary total disability, even for sixteen and one-half months, followed by complete recovery before the institution of suit, is not within its terms. *Grenon v. Ins. Co.,* 52 R. I., 456; *Ginell v. Prudential Ins. Co.,* 237 N. Y., 554; *Hawkins v. Ins. Co.,* 205 Ia., 760; *Shipp v. Ins. Co.,* 146 Miss., 18; *Mackenzie v. Assurance Society,* 251 N. Y., Supp., 528; *Ins. Co. v. Noe,* 161 Tenn., 335; *Doyle v. Ins. Co.,* 168 Ky., 789; *Hollobaugh v. Ins. Asso.,* 138 Pa., 595; 7 Couch on Insurance, 5782; Joyce on Insurance (2 ed), 5246; 1 C. J., 466. *Contra Penn Mut. L. Ins. Co. v. Milton,* 160 Ga., 168, 127 S. E., 140, 40 A. L. R., 1382, and cases cited. See, also, *Losnecki v. Ins. Co.,* 106 Pa. Super. Ct., 259, 161 Atl., 434.

Speaking to the question in *Metropolitan L. Ins. Co. v. Blue,* 222 Ala., 665, 133 So., 707, 79 A. L. R., 852, *Bouldin, J.,* delivering the opinion of the Court, said:

"Appellee conceives that because the policy provides for payments to begin within three months after total disability intervenes, and because the insurer reserves the right to call additional proofs from time to time after accepting proofs of permanent total disability, the expression 'totally and permanently disabled' covers that disability for three months, or some other undefined period. Some authority for such construction is not lacking. But the great weight of authority is otherwise, and for good reason. 'Permanent' has a well-known obvious meaning; is in contradiction to 'temporary,' so used in legal enactments as well as contracts. The construction insisted upon would wipe out all distinction between 'temporary' and 'permanent' disability.

"So, the provisions mentioned are properly construed as affording a reasonable time to ascertain whether the disability is 'total and permanent,' and to keep open the question if after events disclose that it was not in fact permanent, but only reasonably appeared so to be," citing many authorities for the position.

There is a natural feeling that after an insurance company has received its premiums, it ought not to be allowed to escape liability or to avoid responsibility, and the just rule is that policies will be construed strictly against the insurers and in favor of the assured. *Conyard v. Ins.*

Co., 204 N. C., 506, 168 S. E., 835. "The policy having been prepared by the insurers, it should be construed most strongly against them." *Bank v. Ins. Co.*, 95 U. S., 673; 14 R. C. L., 926. But it is not the province of the courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended. *Guarantee Co. v. Mechanics' Bank*, 183 U. S., 402.

In the case of *Grenon v. Met. L. Ins. Co., supra*, the Supreme Court of Rhode Island dealt with similar provisions in a policy of life insurance in a manner accordant with the weight of authority, as follows:

"The fact that plaintiff proved a total temporary disability does not entitle him to compensation. The proof required is of total and permanent disability. The word permanent does not mean temporary. Its normal and natural meaning in an insurance policy is the same as it is in common every day speech. Unless the provisions of the entire policy clearly show that a vital word is inaccurately used such word should be given its usual meaning.

"The policy also provides as follows: 'Notwithstanding that proof of disability may have been accepted by the company as satisfactory, the insured shall at any time, on demand from the company, furnish due proof of the continuance of such disability, but after such disability shall have continued for two full years the company will not demand such proof more often than once in each subsequent year. If the insured shall fail to furnish such proof, or if the insured shall be able to perform any work or engage in any business whatsoever for compensation or profit, the monthly income herein provided shall immediately cease, and all premiums thereafter falling due shall be payable according to the terms of said policy and of this supplementary contract.'

"The provision for the beginning of payments was clearly intended to secure to the insured the benefits of the policy when there was doubt whether the total disability was permanent. . . .

"Plaintiff relies much on the case of *Penn Mutual Life Ins. Co. v. Milton*, 160 Ga., 168. In that case it was decided that a disability which lasted sixteen months and from which the insured had recovered was a permanent disability within the meaning of the provision of a policy of insurance. The court based its decision upon the construction of the terms of the policy and an implication therein that the insurer contemplated that the disability of the insured might not be permanent and consequently was liable for a total and temporary disability. This case has not been generally followed and is fairly open to the criticism that it does not give due weight to the plain language of the policy."

The provision that "such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months," was not intended to create a conclusive or irrebuttable presumption, but to extend to the assured the benefits of the policy upon the presumption and finding of permanency though doubt existed as to whether his disability would ultimately prove permanent or only temporary. The plaintiff's admission that he had recovered from his disability at the time suit was brought removed all doubt as to the character of his disability, and is therefore fatal to his case. *Mackenzie v. Assurance Society, supra.*

The position of the plaintiff is, that he has shown a total disability, which, under the terms of the policy, was, for a time at least, presumed to be permanent, and that he is entitled to collect benefits during the period and so long as such presumption continued. But neither the presumption of permanency, nor any provision of the policy, changes it from one indemnifying against total and permanent disability to one covering total and temporary disability, or even to one covering total and presumably permanent disability as was the case in the companion suit above mentioned.

Had suit been brought during the time of plaintiff's illness and a finding had upon the presumption and other evidence that his disability was both total and permanent, he would have been entitled to collect benefits under the policy, subject to discontinuance upon his "recovery from disability" (paragraph III of the policy), but in the face of plaintiff's own admission that his disability was temporary, no jury could find that it was both total and permanent, and no such finding appears on the present record. Totality of disability plus presumption of permanency for a time is the most that has been shown, and this is not within the terms of the policy.

In the last analysis, it all comes to this: The policy covers a total and permanent disability. Plaintiff has shown a total and temporary disability. The disability shown by the plaintiff is not covered by the policy. The demurrers should have been sustained.

Reversed.

JOHN D. PERDUE AND MALCOLM CAMERON, ADMINISTRATORS OF RAYMOND R. PERDUE, DECEASED, v. THE STATE BOARD OF EQUALIZATION, AND THE STATESVILLE GRADED SCHOOLS.

(Filed 24 January, 1934.)

1. **Master and Servant F i—Findings of fact of Industrial Commission are conclusive on courts when supported by evidence.**

The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of his employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. N. C. Code, 8081(ppp).

2. Same—

Conclusions of law on which the Industrial Commission makes or denies an award are not conclusive on the courts.

3. Master and Servant F a—

A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the Compensation Act. N. C. Code, 8081(1).

4. Same: Schools and School Districts G a—Teachers employed by school district are employees of the district and not the State.

The State Board of Equalization has no power or duty in regard to teachers of a graded school district other than to provide for their salaries as provided by chapter 430, Public Laws of 1931, and a person elected teacher and director of athletics by a school district, C. S., 5559, whose salary as teacher is paid with funds allotted by the State Board of Equalization and whose salary as director of athletics is paid by the district from other funds, is an employee of the school district and not an employee of the Board of Equalization or the State, and the school district is liable for an award of compensation by the Industrial Commission for his death by accident arising out of and in the course of his employment, the legislative intent not to make teachers employees of the State within the meaning of the Compensation Act being shown by the acts providing that the State should make no allowance for compensation insurance for any of the counties, section 30, chapter 430, Public Laws of 1931, and that counties and school districts might exempt themselves from the Compensation Act, section 1, chapter 274, Public Laws of 1931.

5. Master and Servant F i—

On appeal from an award of the Industrial Commission the court's order in compliance with the statute as to attorneys' fees is within his discretion and is not reviewable.

APPEAL by plaintiffs and by the defendant, the Statesville Graded Schools, from *Warlick, J.*, at May Term, 1933, of IREDELL. Affirmed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act. N. C. Code of 1931, chap. 133A, Public Laws of N. C., 1929, chap. 120.

The proceeding was first heard by Commissioner Dorsett, who on the facts found by him, awarded compensation to the plaintiffs, to be paid by the defendants in proportion to the amounts contributed by them to the payment of the salary of the deceased. This award was reviewed by the full Commission on the appeal of the defendants.

The facts found by the North Carolina Industrial Commission, and as shown by the record are as follows:

1. The plaintiffs are the administrators of Raymond R. Perdue, who died on 30 October, 1931, intestate and without dependents. His father, J. D. Perdue, is his sole next of kin.

The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act. The State Board of Equalization is an agency of the State of North Carolina, which is a self-insurer. The Statesville Graded Schools District has no compensation insurance and has not exempted itself from the provisions of the North Carolina Workmen's Compensation Act, as authorized by section 1 of chapter 274, Public Laws of N. C., 1931. The said district is a noninsurer.

Immediately before his death, the deceased, Raymond R. Perdue, was engaged in the performance of his duties as the coach of the football team of the Statesville Graded Schools. This team was playing a game of football with the team of the Taylorsville High School, at Taylorsville, N. C. While the game was in progress, the deceased left the side lines and went upon the field for the purpose of making a protest to the referee against the conduct of head linesman. After he had made his protest, and before he had left the field, the deceased was struck on or about the head by the head linesman, who had been angered by his protest to the referee. The deceased fell to the ground, unconscious. He was taken from the football field, at once, to an ambulance, which was driven to a hospital at Statesville, N. C. When the ambulance arrived at the hospital, it was discovered that the deceased was dead. His death was the result of an injury by accident which arose out of and in the course of his employment as the coach of the football team of the Statesville Graded Schools.

3. At the time of his death, the deceased, Raymond R. Perdue, was employed as a teacher in the high school of the Statesville Graded Schools, at a salary of $90.00 per month. He was also employed as director of athletics in said school, at a salary of $300.00, payable in nine monthly installments. His salary as a teacher in the high schools was paid out of funds allotted to the Statesville Graded Schools District by the defendant, the State Board of Equalization, as provided by chapter 430, Public Laws of N. C., 1931. His salary as director of athletics was paid by the Statesville Graded Schools District out of funds derived from other sources. The deceased was employed both as a teacher and as director of athletics by the trustees of the Statesville Graded Schools District, on or about 25 August, 1931, for a term of nine months. His average weekly wages at the time of the accident which resulted in his death were in excess of $30.00 per week.

On these facts, the Industrial Commission reversed the award of Commissioner Dorsett, requiring the defendant, the State Board of Equalization to pay a certain percentage of the compensation awarded to the plaintiffs, and awarded compensation in the sum of $5,344.16, to be paid to the plaintiffs for the father of the deceased as his sole next of kin, by the defendant, the Statesville Graded Schools. From this award, both the plaintiffs and the defendant, the Statesville Graded Schools, appealed to the Superior Court of Iredell County.

At the hearing of this appeal, the award of the Industrial Commission was affirmed. It was ordered by the court that the attorneys for the plaintiffs be allowed a reasonable attorneys' fee to be determined by the Industrial Commission in accordance with section 8081(rrr) of the N. C. Code of 1931, and to be paid out of the compensation awarded to the plaintiffs.

From the judgment of the Superior Court, both the plaintiffs and the defendant, the Statesville Graded Schools, appealed to the Supreme Court.

Brown & Price, Willis Smith and John H. Anderson, Jr., for plaintiffs.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for defendant, State Board of Equalization.

Land & Sowers for defendant, Statesville Graded Schools.

CONNOR, J. There was evidence at the hearing of this proceeding by the Industrial Commission tending to show that the death of Raymond R. Perdue, the plaintiff's intestate, was the result of an injury by accident which arose out of and in the course of his employment as the coach of the football team of the Statesville Graded Schools. For this reason the finding by the Industrial Commission to that effect is conclusive, and was not reviewable by the Superior Court; nor is such finding reviewable by this Court.

It is sufficient to say that the statute so provides. N. C., Code of 1931, sec. 8081(ppp), Public Laws of N. C., 1929, chap. 120, sec. 60. This Court has consistently and uniformly held that if there was competent evidence of sufficient probative force at the hearing by the Industrial Commission of a proceeding for compensation under the Workmen's Compensation Act, of which the Industrial Commission had jurisdiction, to support the findings of fact on which the Commission has awarded or denied compensation, such findings of fact by virtue of the statute cannot be reviewed by either the Superior or the Supreme Court. It is otherwise, as to conclusions of law on which the award was made or denied. For this reason the contention of the appellant, the Statesville Graded Schools, on this appeal, that there is error in the judgment of the Superior Court predicated upon the finding that the death of Raymond R. Perdue was the result of an injury by accident which arose out of and in the course of his employment cannot be sustained.

All the evidence at the hearing of this proceeding by the Industrial Commission shows that at the time of his death, Raymond R. Perdue, plaintiff's intestate, was an employee of the Statesville Graded Schools. He was employed both as a teacher and as director of athletics. As director of athletics, it was his duty to train and coach the football team of the high school, and to attend said team when playing at Statesville or elsewhere. He was an employee of the Statesville Graded Schools District, a political subdivision of the State, and for this reason was entitled to the benefit of the provisions of the North Carolina Workmen's Compensation Act. N. C. Code of 1931, sec. 8081(l), subsections (a) and (b).

The deceased was not an employee of the State of North Carolina, nor of the State Board of Equalization. The fact that his salary as a teacher in the Statesville Graded Schools was paid by said schools out of funds allotted to the Statesville Graded Schools District by the State Board of Equalization, under the provisions of chapter 430, Public Laws of N. C., 1931, does not constitute him an employee of said board or of the State. He was elected both as a teacher and as director of athletics by the board of trustees of the Statesville Graded Schools District. C. S., 5559. He was not elected or employed either as a teacher or as director of athletics by the State Board of Equalization. This board had no power and no duty with respect to the Statesville Graded Schools District, or to the teachers or other employees of said district, except to provide for the payment of their salaries and wages, as provided by chapter 430, Public Laws of N. C., 1931.

It is provided by section 30 of chapter 430, Public Laws of N. C., 1931, that "no allowance shall be made for compensation insurance for any of the counties of the State." By amendment of section 8 of chapter 120, Public Laws of N. C., 1929, by section 1 of chapter 274, Public Laws of N. C., 1931, it is provided that any county or school district in the State may, at its option, by action of the governing body of such county or school district, exempt itself entirely from liability for compensation to its teachers or other employees for compensation under the provisions of the Workmen's Compensation Act. These two statutory provisions make it clear that it was not the purpose of the General Assembly by the enactment of chapter 430, Public Laws of N. C., 1931, to make teachers in the public schools of the State employees of the State or of the State Board of Equalization, within the meaning of the North Carolina Workmen's Compensation Act.

The contention on this appeal that there was error in the judgment affirming the award of the Industrial Commission that the compensation awarded to the plaintiffs shall be paid by the Statesville Graded Schools

District, and that the State Board of Equalization is not liable for any part of such compensation, cannot be sustained.

It does not appear from the judgment or from the record in this appeal that Judge Warlick declined to order that an attorneys' fee, to be determined as to amount by the Industrial Commission, in addition to the compensation awarded to the plaintiffs, should be paid by the Statesville Graded Schools to the attorneys for the plaintiffs. In any event, under the statute (sec. 11 of chapter 274, Public Laws of N. C., 1931), this was within the discretion of the court, and the order appearing in the judgment will not be reviewed by this Court. We find no error in this appeal. The judgment is

Affirmed.

STATE v. E. A. DAVIDSON, J. B. STOREY AND J. W. DAVIDSON.

(Filed 24 January, 1934.)

1. **Banks and Banking I f—Evidence held sufficient to be submitted to jury on issue of criminal conspiracy to make loans in violation of statute.**

Evidence that the president and cashier of a bank made loans to one of its directors or to corporations in which he was pecuniarily interested, and that each of the parties knew of the loans and the renewals thereof and that such loans were in excess of the legal limit to which the bank could loan to one person, direct or indirect, the loans being greatly in excess of twenty per cent of the capital stock and permanent surplus of the bank, N. C. Code, 220(b), (d), and that the loans were made with intent to cheat, injure or defraud the bank, *is held* sufficient to be submitted to the jury as to each defendant's guilt of criminal conspiracy to make loans in violation of the statute, punishable upon conviction by imprisonment in the State's prison, the fact that the loans were made by the parties under the conditions being a circumstance from which the jury could infer an agreement to make the loans with criminal intent.

2. **Conspiracy B b—**

Criminal conspiracy may be shown by facts and circumstances pointing unerringly to that end.

APPEAL by defendants from *Clement, J.*, at April Term, 1933, of CHEROKEE. No error.

This is a criminal action in which the defendants were tried on an indictment charging that the defendants, E. A. Davidson, J. B. Storey and J. W. Davidson, president, cashier, and a director, respectively, of the Cherokee Bank, at Murphy, N. C., wilfully, unlawfully and feloniously, did conspire, each with the others, to cheat, injure and defraud the said Cherokee Bank by means of loans to be made by said defendants to the defendant, J. W. Davidson, or to firms or corporations in which the said defendant was pecuniarily interested, in violation of the banking laws of this State, said loans having been made and evidenced by certain notes set out in the indictment, and aggregating the sum of $18,755.55; and further that said defendants wilfully, unlawfully and feloniously did abstract, misapply and misappropriate moneys of the said Cherokee Bank, in sums aggregating $18,755.55, by loaning said sums to the defendant, J. W. Davidson, a director of the said Cherokee Bank, and a son of its president, the defendant, E. A. Davidson, in violation of the banking laws of this State; all contrary to the statute in such cases made and provided, and against the peace and dignity of the State.

There was a verdict of guilty as to each defendant.

From judgment that each defendant be confined in the State's prison for the term prescribed in the judgment, the defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

Moody & Moody, Geo. B. Patton and D. Witherspoon for the defendants, E. A. Davidson and J. W. Davidson.

M. W. Bell for the defendant, J. B. Storey.

CONNOR, J. The evidence offered by the State at the trial of this action shows the following facts:

The Cherokee Bank was organized under the laws of this State in 1920, and began business as a banking corporation at Murphy, N. C., during the month of August of that year. It continued to do business until 3 October, 1931, when it was closed by the Commissioner of Banks of North Carolina, because of its insolvency. Its insolvency was disclosed by an examination of its affairs made under the direction of the Commissioner of Banks, and was admitted by its directors. Its assets are now in the possession of the said commissioner, by whom they are being liquidated as provided by statute. N. C. Code of 1931, sec. 218(c), chap. 113, Public Laws of N. C., 1927, as amended.

The capital stock of the Cherokee Bank from the date on which it began business until it was closed was $17,500. At the date of its closing, and for many years prior thereto, its permanent surplus was $500.00. Its capital stock and permanent surplus at the times the loans described in the indictment were made was $18,000. The examination of its affairs made under the direction of the Commissioner of Banks on or about 1 October, 1931, disclosed that the capital stock of the Cherokee

Bank was then and had been for some time impaired to the extent of $9,635. This impairment was the result of insolvent loans and shortages. The assets of the said bank are not now sufficient in value to pay more than 25 per cent of its liabilities. Its insolvent condition is due in part to the bad management of its affairs by its officers and directors, and in part to the general deflation in values which has occurred since 1929. Its loans were not only insolvent but also in many cases in violation of the banking laws of the State, particularly, in that loans were made to persons, firms and corporations whose total direct and indirect liability to said bank, at the time said loans were made, exceeded 20 per cent of the unimpaired capital stock and permanent surplus of said bank.

At the date of its closing, the defendant, E. A. Davidson, was the president of the Cherokee Bank. He had been its president continuously since its organization in 1920. He was at all times in the active management of the business of said bank, and at the times the loans described in the indictment were made knew not only that said loans had been made, but also that said loans were in violation of the law. These loans were evidenced by notes which were renewed from time to time, the last renewals having been made in 1930 and 1931. The said loans were made to the defendant, J. W. Davidson, a son of the defendant, E. A. Davidson, whose total liability to the said bank, direct and indirect, at the times the loans were made and the notes renewed largely exceeded 20 per cent of the unimpaired capital stock and permanent surplus of the bank.

The defendant, J. B. Storey, was cashier of the Cherokee Bank at the date of its closing. He was cashier of said bank at the times the loans described in the indictment were made, and at the times the notes and renewal notes for said loans were accepted by the said bank. He kept the records of the bank, and in the absence of its president from time to time made or renewed loans for the bank. He knew that the loans described in the indictment, made to the defendant, J. W. Davidson, were in violation of the law.

The defendant, J. W. Davidson, was at the date of the closing of the Cherokee Bank a director of said bank, and was active in the management of its affairs. He was a director at the times the loans described in the indictment were made to him. At the dates of said loans his total liability to the bank, both direct and indirect, largely exceeded 20 per cent of its unimpaired capital stock and permanent surplus. At the date of the closing of the bank, such liability exceeded the sum of $22,304.85. At the dates of the last renewals of these loans in 1930 and 1931, the said J. W. Davidson was insolvent. Since the closing of the bank, he and some of the corporations in which he was pecuniarily interested, and to which the loans were made, have been adjudged bankrupts.

The defendants offered no evidence at the trial of the action, but moved for judgment dismissing the action as of nonsuit. C. S., 4643. The motion was denied and defendant excepted. There was no error in the denial of defendants' motion. The evidence was properly submitted to the jury.

It is an offense against the banking laws of this State for any bank doing business in this State, under its laws, to make a loan of its moneys to any person, firm or corporation, whose liability, direct and indirect, to such bank at the time the loan is made exceeds the maximum percentage of the unimpaired capital stock and permanent surplus of the bank, as fixed by statute. Such an offense is a misdemeanor. *S. v. Cooper,* 190 N. C., 528, 130 S. E., 180. Such maximum percentage as fixed by statute is now and was at the times the loans described in the indictment were made to the defendant, J. W. Davidson, 20 per cent. N. C. Code of 1931, sec. 220(b), and sec. 220(d).

An agreement by the officers and directors of a bank doing business in this State, under its laws, to make a loan in violation of the statute, certainly when entered into with an intent to cheat, injure or defraud the bank, is a criminal conspiracy, for which such officers and directors of the bank as have entered into the agreement, upon conviction, may be punished by imprisonment in the State's prison. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733.

Where the evidence at the trial of an indictment of two or more officers and directors of a bank for such criminal conspiracy shows, as in the instant case, that a loan was made by such officers and directors in violation of the statute, it may reasonably be inferred by the jury that such officers and directors entered into an agreement to make the loan before the same was made. The criminal character of the agreement may be inferred from facts and circumstances where they point unerringly to that end, as they do in the instant case. See *S. v. Wrenn,* 198 N. C., 260, 151 S. E., 261.

Assignments of error on this appeal based upon exceptions with respect to the admission of evidence at the trial, and upon exceptions to instructions of the court to the jury, have been carefully examined and considered. They cannot be sustained. We find no error in the trial. The judgment is affirmed.

No error.

J. C. GORDON v. THOMASVILLE CHAIR COMPANY.

(Filed 24 January, 1934.)

Master and Servant F b—Evidence held sufficient to support finding that accident arose out of and in course of employment.

Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to ride him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put up his lunch in the room where he worked and went to a platform at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury *is held* sufficient to support the finding of the Industrial Commission that the injury resulted from an accident arising out of and in the course of his employment.

APPEAL by defendant from *Sink, J.,* at 2 November Term, 1933, of DAVIDSON. Affirmed.

This action was brought under the Workmen's Compensation Act.

STATEMENT OF THE CASE.

The plaintiff did not work on Friday and Saturday before the date of his accident on Monday because of a big snow. On Monday morning, 19 December, 1932, he rode to work with a fellow-employee, telling his son to come along behind when the chains had been put on their automobile, so that if the plant did not run he, the plaintiff, could have a ride back home.

The plaintiff reached the plant, inquired if the plant would run that day, and went down to the basement where he worked. He put his lunch up, and started on his way to the outside platform at the front of the plant to tell his son that the plant would run. There were two doors, one within the plant through which he went just as the five-minute to seven whistle blew. He crossed another room and went through a door and stepped to an outside platform at the front of the plant, his feet slipped on ice and he fell and slid some distance and down some steps. He was picked up, partly conscious, and taken back into the mill.

The plaintiff testified it was his purpose to go tell his son not to wait for him, that he was going to work that day. The son however had inquired from other workers and had learned that the mill would run, so did not wait to get the message from his father.

Upon all the evidence in this case, the commissioner makes the following:

FINDINGS OF FACT.

1. That the parties to this proceeding have accepted the provisions of the North Carolina Workmen's Compensation Act; that the defendant employer is a self-insurer.

2. That the plaintiff sustained an injury by accident arising out of and in the course of his employment on 19 December, 1932; that the plaintiff is still totally disabled.

3. That the average weekly wage was $8.58.

CONCLUSIONS OF LAW.

The attending physician in this case testified that in his opinion the plaintiff had 40% general partial disability, and used as a basis for his opinion the X-Ray picture which showed slight curvature of the spine, which in his opinion was due to the dislocation of a rib. However, the commissioner takes judicial notice of the fact that the plaintiff is a pronounced hunchback. Therefore, the hearing commissioner is holding in abeyance a decision on the question of permanent disability, and is going to order the plaintiff to report to Dr. O. L. Miller, at Charlotte, for further examination and such treatment as the doctor may direct.

The defendant contended that the plaintiff was going to this platform or the street to smoke, which was purely personal. In either case, he was on the premises ready for work, and is entitled to compensation.

AWARD.

The commissioner awards the plaintiff compensation at the rate of $7.00 per week for the period of total disability.

The defendant will arrange for the examination of the plaintiff at the hands of Dr. O. L. Miller, and provide the necessary transportation.

The defendant will pay the costs of this hearing, which shall include a witness fee of $10.00 to Dr. W. G. Smith, and mileage at the rate of 8 cents per mile.

The plaintiff's attorney is allowed a fee of $35.00, to be deducted from accrued compensation and paid direct.

T. A. WILSON, *Commissioner.*

An appeal was taken by the defendant self-insurer to the full Commission. The judgment of the full Commission is as follows:

This is an appeal on the part of the defendant, a self-insurer, from an award issued by the Industrial Commission at the request of the trial commissioner, Mr. Wilson. The defendant takes the position that the accident in this case did not arise out of and in the course of the employment, laying particular stress upon the fact that it did not arise out of the employment. The full Commission believes that the award of the trial commissioner should not be disturbed. We find no error of law in the application of the facts to the law by the trial commissioner in this case. The judgment of the trial commissioner is therefore affirmed in all respects. The appeal is dismissed.

An appeal was taken by the defendant self-insurer to the Superior Court and the judgment is as follows:

This cause coming on to be heard before the undersigned judge, by consent, and being heard, and the court being of the opinion that the award of the full Commission is justified and proper from all the evidence;

Now, therefore, it is ordered, adjudged and decreed that the award of the North Carolina Industrial Commission and the findings of facts be and the same are hereby affirmed and approved.

The defendant self-insurer excepted and assigned as errors:

1. The defendant assigns as error the judgment of his Honor, the judge of Superior Court, for that, the said judgment affirms the holding of the North Carolina Industrial Commission.

2. The defendant assigns as error the failure of his Honor, the judge of the Superior Court, to reverse the award of the North Carolina Industrial Commission and remand this action to the said Industrial Commission, directing them to enter an award denying compensation to the plaintiff.

Don A. Walser for plaintiff.
Spruill & Olive for defendant.

CLARKSON, J. This is an action brought by plaintiff against the defendant self-insurer under the North Carolina Workmen's Compensation Act. Public Laws of North Carolina, 1929, chap. 120. Plaintiff contends that under section 2(f) of said act, he sustained injury "by accident arising out of and in the course of the employment." N. C. Code of 1931 (Michie), 8081(i) (f). This was denied by defendant. The trial commissioner found "that the plaintiff sustained an injury by accident arising out of and in the course of his employment on 19 December, 1932." On appeal by defendant from the trial commissioner his decision was affirmed by the full Commission. On appeal to the Superior Court, the judgment of the full Commission was sustained, an appeal was then taken to the Supreme Court. We do not think the exceptions and assignments of error made by defendant self-insurer can be sustained. The plaintiff was an employee of the defendant, but was not certain the plant would run on the Monday morning he went to work.

He lived some distance from the plant and rode to work with a fellow-employee. There had been a big snow and he had his son to come with his automobile so that he could ride back home, if the plant would not run that day. He went to his place of work and found that the plant would run that day and put his lunch up. This was about the time the five-minutes to seven whistle blew. He then went to the outside platform at the front of the plant to tell his son that the plant would run and his feet slipped on ice and he fell and was injured. We think the facts of this case come within the decision of *Bellamy v. Mfg. Co.,* 200 N. C., 676. In that case, after citing numerous authorities, at page 679, is the following:

In *N. C. R. R. Co. v. Zachary,* 232 U. S. Rep., at p. 260, we find: "Again, it is said that because deceased had left his engine and was going to his boarding-house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us, clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

The defendant's contention cannot be sustained. We think the plaintiff was "on duty." The case of *Beavers v. Power Co., ante,* 34. "The *Photographer case*" is easily distinguishable. The judgment of the court below is

Affirmed.

IN RE JAMES LESLIE ALBERTSON.

(Filed 24 January, 1934.)

1. **Habeas Corpus B e—**

   In *habeas corpus* proceedings for the custody of a minor child either party may appeal to the Supreme Court from final judgment. C. S., 2242.

2. **Divorce F a—Upon separation custody of children may be determined by habeas corpus, but after divorce procedure is by motion in cause.**

   Construing C. S., 1664 and 2241 together it *is held* that where husband and wife have separated without being divorced the right to the custody of minor children may be determined by *habeas corpus* proceedings, but where the parties have been divorced and the decree does not award the custody of the children, the procedure to determine the right to their custody is by motion in the cause, and *habeas corpus* will not lie, and where in *habeas corpus* proceedings a decree for absolute divorce between the parties is introduced in the record without objection, but the court makes no finding as to whether the parties had been divorced, but awards the custody of the child to its mother, on appeal the case will be remanded for a finding as to whether the parties had been divorced.

3. **Same—Agreement in deed of separation does not preclude court from awarding custody of child in divorce action.**

A deed of separation between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon granting a decree for absolute divorce in a suit brought subsequent to the deed of separation, from awarding the custody of the child in accordance with the statute. C. S., 1664.

APPEAL by respondent W. H. Albertson from *Sink, J.*, at Chambers, 24 June, 1933. From GUILFORD. Error and remanded.

Habeas corpus to determine the custody of James Leslie Albertson, an infant, eight years of age. The mother of the infant is Mrs. Grace Albertson the petitioner and the father is W. H. Albertson the respondent. These parties were married to each other on 19 June, 1923, and their son was born on 6 November, 1926. In September, 1929, they separated and on 26 February, 1930, they executed an agreement of separation which contains this paragraph: "The said wife shall have the sole and exclusive custody, care and control of the child of the parties hereto, to wit, Leslie, age five years, except that the husband shall have the privilege of seeing the said child at any time he desires."

There is evidence that thereafter the respondent instituted an action against the petitioner for absolute divorce in the municipal court of the city of High Point and that at September Term, 1932, he was granted a decree dissolving the bonds of matrimony. The court made no order as to the custody of the child; but on 9 June, 1933, the respondent took him from the petitioner and placed him in the home of a family in Randolph County. On the next day the petitioner obtained a writ of *habeas corpus* and at the hearing Judge Sink awarded the custody of the child to the mother, finding that she is a fit and proper person to whom to commit his custody and control. The respondent appealed.

T. W. Albertson and Walser & Casey for appellant.
Thomas Turner, Jr., for appellee.

ADAMS, J. No question is made as to the right of appeal, the statute providing that in all cases of *habeas corpus* where a contest arises in respect to the custody of minor children, either party may appeal to the Supreme Court from the final judgment. C. S., 2242; *Stokes v. Cogdell*, 153 N. C., 181.

In his answer to the petition for the writ the respondent alleges that after the deed of separation was executed he was granted a decree by which the marriage relation between the petitioner and himself was dissolved; and at the hearing he introduced without objection a written instrument purporting to be a judgment of the municipal court of the city of High Point in the case of W. H. Albertson *v.* G. P. Albertson dissolving the bonds of matrimony between these parties. In the present case the judgment awarded the custody of the child to the mother, but Judge Sink made no reference to the decree of divorce and recited the fact that by agreement contained in the deed of separation the custody of the child had been committed to the petitioner.

If the parents of James Leslie Albertson have been granted an absolute divorce, the controversy in the case before us is similar to that which arose in the case of *Natalie Blake,* 184 N. C., 278. There a petition for *habeas corpus* was filed by the mother of the child against Hubert M. Blake, the child's father. The petitioner had previously been divorced from the respondent in the Superior Court of Mecklenburg County, but the custody of the child had not been determined. The court hearing the writ of *habeas corpus* awarded the custody of the child to the mother and the respondent appealed. This Court found error in the order chiefly upon provisions contained in sections 1664 and 2241 of the Consolidated Statutes. In the former section it is provided that after the filing of the complaint in an action for divorce, either from the bonds of matrimony or from bed and board, both before and after final judgment therein, it shall be lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition, and maintenance of minor children of the marriage as may be proper, and from time to time to modify or vacate such orders; also that the judge may commit the custody and tuition of such infant children to the father or mother as may be thought best, or alternately to one of them for a limited time and thereafter to the other.

Section 2241 has the following provision: "When a contest shall arise on a writ of *habeas corpus* between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children." For good cause the court or judge may annul, vary, or modify the order.

In the *Blake case* this Court held that the parents must be living in a state of separation, "without being divorced," before the court can exercise power by proceedings in *habeas corpus* to determine the custody of a child, and that as the parents had been divorced and freed from the bonds of matrimony, relief should have been sought by motion in the original cause. The interrelation of the two sections (1664 and 2241) is obvious. The Legislature intended that in cases in which the parents have been divorced the custody of children should be determined by the court in which the divorce was granted, and if there has been no divorce and the husband and wife are living in a state of separation, by proceedings in *habeas corpus*.

In the pending case the respondent offered in evidence a purported decree of divorce between the petitioner and the respondent, but the record contains neither an admission nor a finding of fact that the marriage relation has been dissolved. An intelligent disposition of the appeal depends upon the determination of this question; if the bonds of matrimony have been dissolved the relief sought cannot be administered by the writ of *habeas corpus*.

The appellee suggests that the municipal court of the city of High Point has no jurisdiction in actions for divorce, but jurisdiction is claimed by virtue of the Public-Local Laws of 1927, chap. 699, amending the Public-Local Laws of 1913, chap. 569, by which the court was created and organized. The asserted invalidity of the divorce does not appear in the decree or the record and we cannot consider the collateral question whether the act creating the court transgressed any constitutional limitations.

The agreement in the deed that the petitioner should have the care and control of the child cannot deprive the court of its power to adjudicate the custody. 19 C. J., 347, sec. 804; 30 C. J., 1059, sec. 836.

The cause is remanded to the Superior Court for a specific finding on the contested question whether the marriage relation between the petitioner and the respondent has been dissolved.

Error and remanded.

COUNTY OF BUNCOMBE v. JOHN C. ARBOGAST ET AL.

(Filed 24 January, 1934.)

Taxation H c—Held: motion to set aside tax foreclosure sale for irregularities was correctly allowed under facts of this case.

This appeal was from the allowance of a motion in tax-foreclosure suit to set aside the sale and vacate the order of confirmation. It appeared that no service of summons was made on the registered mortgagee, that movant acquired title under the mortgage and that upon acquiring title he attempted to pay off all taxes, but due to the inadvertence of the tax collector the taxes for the year in question were not paid, that no deed had been executed to the claimant under the tax-foreclosure sale and it not appearing that the price bid had been paid or tendered, that the bid was entered by a person acting as alleged agent for the purchaser, but that the alleged agent although appearing on the records as the purchaser, disclaims that he was the purchaser and refuses to transfer his bid to claimant and it nowhere appearing in the records that claimant was the purchaser, that the commissioner's reports failed to indicate the land covered by the sale or that the reports were ever filed in the clerk's office, and it appearing that the order of confirmation was entered before the expiration of twenty days from the alleged reports, and it further appearing that claimant was a corporation controlled by the son of the original owner and that he was attempting to get title to the property to the detriment of the mortgagee and present owner. *Held*, the motion was correctly allowed.

APPEAL by Auburn-Asheville Company, alleged purchaser at tax sale foreclosure, from *Alley, J.*, at April Term, 1933, of BUNCOMBE.

Motion in tax sale foreclosure suit to set aside sale and to vacate order of confirmation.

The essential facts are these:

1. In 1928, the property in question, situate on Courtland Avenue, city of Asheville, and worth approximately $20,000, was owned (subject to a deed of trust, later foreclosed) and listed for taxes by John C. Arbogast and wife, Ida M. Arbogast.

2. Movant acquired title to the property in 1930, under the circumstances detailed in the case of *Arbogast v. Corp. Com.*, 200 N. C., 793, 158 S. E., 559, to which reference may be had, if desired, without repeating here.

3. An effort was made to pay all back taxes at the time movant acquired the property, but those for 1928, amounting to $445.69, were not included, due to inadvertence on the part of the tax collector.

4. This suit to foreclose the 1928 tax sale certificate was instituted 7 November, 1930. Sale was ordered, bid in by D. C. Lentz, agent, and confirmation entered 27 April, 1932.

5. On 5 September, 1932, this confirmation was rescinded by the clerk on the ground that the bid of D. C. Lentz, agent, was made by mistake, and a resale was ordered. It is the claim of Auburn-Asheville Company that said bid was made for it. Ralph Arbogast, son of John C. and Ida M. Arbogast, is president and majority stockholder of said company.

6. The present motion in the cause was filed 24 October, 1932, pending the resale. It is based upon the following alleged irregularities in the proceeding:

"(a) That the order of publication of summons against the defendants, John C. Arbogast and wife, Ida M. Arbogast, is not dated.

"(b) That the notice of publication of summons in said proceedings is dated 11 December, 1931, and is returnable 9 January, 1932.

"(c) That facts with respect to the bid on the property claimed by Gurney P. Hood, Commissioner of Banks, *ex rel.,* Central Bank and Trust Company, as shown by the testimony of D. C. Lentz, are that on the morning of the sale, the officers of Auburn-Asheville Company requested the said D. C. Lentz to submit bids on the property for the said corporation, said Lentz advised that he was going to attend the sale on behalf of another client, George P. Street, but would render any assistance he could to Auburn-Asheville Company; that when Taylor Bledsoe, commissioner, cried off the property in controversy, the said Lentz instructed that same be bid off in the name of Auburn-Asheville Company; that through error commissioner Taylor Bledsoe submitted the bid in the name of D. C. Lentz, agent; that afterwards, in order to correct the error, Kelly Hughes, county attorney, requested D. C. Lentz, agent, to transfer his bid, but said Lentz declined to do so because he did not want his name to appear in connection with any property not bid off by George P. Street, and said bid was never transferred, but still stands in the name of 'D. C. Lentz, agent.'

"(d) That the said Taylor Bledsoe, commissioner, purported to file two reports of sale in said action, one specifying that the lands and premises were sold to D. C. Lentz, agent, for the sum of $576.34, and one showing that the said lands and premises were sold to D. C. Lentz, agent, for $238.13, and that upon said reports the order of confirmation, which was afterwards set aside by the clerk, was signed by him and that neither of said reports of sale indicates the lands and premises intended to be covered thereby.

"(e) That neither of the reports of sale, as made by said Taylor Bledsoe, commissioner, show on their face that they were ever filed in the office of the clerk of the Superior Court of Buncombe County and that there is no record in the office of the clerk of the Superior Court showing that said reports were ever actually filed.

"(f) That the two reports of sales filed by Taylor Bledsoe, commissioner, as hereinbefore found, are each dated 9 April, 1932, and the confirmation of sales signed by the clerk are each dated 27 April, 1932."

The motion was allowed, and the Auburn-Asheville Company appeals.

Bourne, Parker, Bernard & DuBose for Auburn-Asheville Company.
Johnson, Smathers & Rollins for Hood, Commissioner of Banks.

STACY, C. J. This case in all of its essential features is controlled by the decision in *Harnett County v. Reardon,* 203 N. C., 267, 165 S. E., 701. Indeed, the judgment might well be affirmed on authority of the *Harnett County case,* without more, but there are other considerations appearing on the present record which tend to support the judgment of vacation:

1. In the first place, it should be observed that no deed has been executed by the commissioner for said property, as was the case, *e. g.,* in *Orange County v. Wilson,* 202 N. C., 424, 163 S. E., 113, and it does not appear that the price bid at the sale has ever been paid or tendered by the alleged purchaser.

2. The order of confirmation, dated 27 April, 1932, recites that D. C. Lentz, agent, became the last and highest bidder at said sale, and directs that deed be made to said purchaser, but D. C. Lentz says he was not the purchaser and does not want the transaction to appear in his name as agent or otherwise.

3. It nowhere appears on the records of the Superior Court that the Auburn-Asheville Company has been adjudged the purchaser at said sale.

4. The commissioner filed two reports, but "neither of said reports of sale indicates the lands and premises intended to be covered thereby." C. S., 8025.

5. The reports are dated 9 April, 1932, but do not show that they were ever filed in the clerk's office. The order of confirmation was entered before the expiration of twenty days from the date of said alleged reports. C. S., 763 and 3243; *Thompson v. Rospigliosi,* 162 N. C., 145, 77 S. E., 113; *Perry v. Perry,* 179 N. C., 445, 102 S. E., 772; *Dixon v. Osborne,* 204 N. C., 480; *loc. cit.,* 487.

6. The equities of the case are with the movant. *Harnett County v. Reardon, supra.* A corporation controlled by the son of the original owners of the land is undertaking to recover a valuable piece of property by means of a tax sale foreclosure, and thus cut off the rights of the mortgagee and the present owner. It is not infrequently the case, that in such an enterprise, due to haste or anxiety perhaps, some vital matter is overlooked, which frustrates the purpose and gives the race not to the swift but to the deserving, demonstrating again that equity pursues the right, abhors the wrong, and enjoins upon all persons "to live honestly, to harm nobody, to render to every man his due." Justinian.

We are not unmindful of the fact that this is a tax sale foreclosure suit under C. S., 8037, as amended, a statute intended to facilitate the collection of taxes and to assure purchasers at tax sales that there is such a thing as "a good tax deed." *Price v. Slagle,* 189 N. C., 757, 128 S. E., 161; *Logan v. Griffith, ante,* 580; *Street v. Hildebrand, ante,* 208, 171 S. E., 58; *Guy v. Harmon,* 204 N. C., 226, 167 S. E., 796; *Street v. McCabe,* 203 N. C., 80, 164 S. E., 329; *Orange County v. Wilson, supra.* Nor have we overlooked the right of the owner to redeem, either under

C. S., 8038, or by motion in the cause for irregularities in the foreclosure proceeding. *Harnett County v. Reardon, supra.*

The jurisdiction of the court to deal with the matter at term is not questioned. C. S., 637; *In re Brown,* 185 N. C., 398, 117 S. E., 291; *Smith v. Gudger,* 133 N. C., 627, 45 S. E., 955.

Affirmed.

CITY OF ASHEVILLE v. JOHN C. ARBOGAST ET AL.

(Filed 24 January, 1934.)

(For digest see *Buncombe County v. Arbogast, ante,* 745.)

APPEAL by Auburn-Asheville Company, alleged purchaser at tax-sale foreclosure, from *Alley, J.,* at June Term, 1933, of BUNCOMBE.

Motion in tax-sale foreclosure suit to set aside sale and to vacate order of confirmation.

Motion allowed. Appeal by alleged purchaser.

Bourne, Parker, Bernard & DuBose for Auburn-Asheville Company.
Heazel, Shuford & Hartshorn for Consolidated Realty Corporation.
Johnson, Smathers & Rollins for Hood, Commissioner of Banks.

PER CURIAM. The case is controlled by the decision in *Buncombe County v. Arbogast, ante,* 745.

Affirmed.

STATE v. ISAIAH HAM.

(Filed 24 January, 1934.)

Criminal Law L c—Exclusion of testimony of declaration offered to impeach dying declaration held not prejudicial on record of this case.

Where a dying declaration of deceased meets all requirements of competency in that it was made when declarant was in actual danger of death and had full apprehension of that danger, and was made shortly prior to actual death of declarant, the exclusion of testimony offered for the purpose of impeaching the dying declaration, that declarant stated to the first person to reach her after she was shot, in response to his question as to what was the matter, that she was drunk, *is held* not prejudicial error where it appears that the excluded declaration was made an hour or so before the admitted dying declaration, and that the witness was allowed to testify that he smelled whiskey on declarant's breath.

APPEAL by defendant from *Barnhill, J.*, and a jury, at April Special Term, 1933, of DURHAM. No error.

The defendant Ham and one Susie Burthay were tried on an indictment charging them with first degree murder of one Maggie Lewis on Thanksgiving night, 24 November, 1932. The jury returned a verdict of not guilty as to Susie Burthay and a verdict of guilty of murder in the second degree as to the defendant, Isaiah Ham. From the judgment of the court below he appealed to the Supreme Court.

Dr. H. R. Sinnett testified for the State, in part:

"I live at the Lincoln Hospital, and have been there since July last, as an interne. I saw Maggie Lewis on night she died. I was on duty that night. It was around nine-thirty when she was admitted and taken to operating room. I examined her. She was in a weakened condition, her pulse lost, blood pressure low. There were two external wounds on her left side. I didn't examine her internally; she was so weak. She was conscious of her condition. She said, "Do something for me, I'm dying." She died later on. She knew she was dying, that she was in imminent danger. She said she knew she was at the Lincoln Hospital. She said Isaiah Ham shot her near the bridge. Mr. King and Mr. Thompson were present. I was present when Dr. Cordice examined her. She died from a bullet wound."

Helen King testified for the State.

"I am night supervisor at Lincoln Hospital. I was there on Thanksgiving night. I admitted Maggie Lewis and asked her questions while she was being examined by doctors, I wanted to get record for hospital. She told me her name and that she lived on Cobb Street. She said she was shot, I rang emergency bell for doctor and he came into room. She said, 'Do something, I'm dying.' She said, 'Isaiah Ham shot me.' She made some statement in front of Dr. Sinnett. She died around eleven-thirty p.m."

H. E. King testified for State:

"I was out that way and came across the ambulance. I saw Maggie Lewis in ambulance. I asked the driver to wait a minute. They opened the door and I asked her who shot her. She answered, 'Isaiah Ham.' I saw her an hour or two later at hospital. In presence of Dr. Sinnett and the nurse, she was asked question as to who shot her. She said, 'Isaiah Ham.' She said she lived at 204 Cobb Street. She did not relate any details as to how she was shot."

There was other testimony to the same effect as the testimony of the above witnesses.

The evidence for defendant:

Isaiah Ham, Mary Canaday, Jake Brown, John Hines, and Willie Lane testified concerning the whereabouts of the defendant, Ham, on the night of the murder, thereby furnishing an alibi, and nothing as to the dying declaration.

Cairo Johnson, testified, in part:

"I was at Johnson Farrington's on Pine Street Road. It is about fifty feet from the bridge. I went to house about six-thirty. Johnson Farrington lived in second house from bridge. I was in that one. I was there practically all evening, going to and from the place. Farrington was going to give party. I stepped inside door and met Maggie Lewis talking to Johnson Farrington. I said, 'Hello, Maggie.' I went to rear of house and then came back to front. Maggie Lewis left alone and went down road by herself. That was about a quarter to eight. About ten or fifteen minutes, or probably twenty-five minutes, I heard a couple of shots. We sat in house a few minutes after shot. Fletcher Norwood heard groans. Fletcher Norwood, his wife and I went down in car and threw lights on her.

Q. What, if anything, did she say to you? A. I asked her what her trouble was and she said, 'I'm drunk.' "

To this, the State objected, and upon the court sustaining the objection, the defendant, Ham, excepted. The State moved to strike out the answer, and it was allowed. The defendant, Ham, excepted. The court instructed the jury to disregard the answer, that which the deceased said to the witness.

This is the only exception and assignment of error made by defendant, Ham. Johnson further testified: "She was gone about fifteen minutes before shots. It was about ten or fifteen after we heard shots before we went out to see what it was all about. It was around ten minutes before ambulance came. When she left house, she was walking at a slow gait. She didn't say anything about her condition at that time. I got very close to Maggie and could smell whiskey when I first met her, but not down on the bridge. When I went down, I picked her up and carried her up on the road a little piece and she exclaimed, 'I'm wounded.' I lay her back down and told Fletcher Norwood to go get the ambulance. I smelled whiskey on her breath when I moved her."

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

T. Spruill Thornton for defendant.

CLARKSON, J. Defendant's only exception and assignment of error is to the action of the court below in excluding certain evidence of a witness by the name of Cairo Johnson who was the first witness to reach the deceased after she was shot, which evidence relates to a statement made by the deceased, "I am drunk."

In *S. v. Mills,* 91 N. C., 581-594. Speaking to the subject of dying declarations is the following:

"The rule for the admission of such testimony is thus laid down in Taylor on Evidence, 648: (1) 'At the time they were made, the declarant should have been in actual danger of death. (2) That he should have a full apprehension of his danger; and (3) That death should have ensued.' From the time the deceased was shot, up to the time he made the declaration as testified to by the witness Ousby, he was heard repeatedly to say, 'I am bound to die.' He told the witness Parker that he was shot in the side and back, and was bleeding internally, and 'was bound to die.'" *S. v. Wallace,* 203 N. C., 284.

The testimony of Dr. Sinnett and others was competent and in fact the defendant does not make any objection to this evidence. The sole exception and assignment of error was the exclusion of the testimony of Cairo Johnson. Q. What, if anything, did she say to you? A. I asked her what her trouble was and she said, "I'm drunk."

This conversation took place about 8:30 o'clock from the testimony of Johnson. From the testimony of Dr. Sinnett it was about 9:30 when she stated to him, "Do something for me, I am dying" and stated that "Isaiah Ham shot her near the bridge." This evidence of Johnson was for the purpose of impeaching the dying declaration of Maggie Lewis. This testimony, which was objected to, was some hour or so before the dying declarations of Maggie Lewis. The court below admitted the testimony of Johnson to the effect, "I got very close to Maggie and could smell whiskey when I first met her, but not down at the bridge," further, "I smelled whiskey on her breath when I moved her." The testimony excluded was a conclusion of Maggie Lewis. The fact that the witness smelled whiskey on her breath was admitted by the court below to impeach Maggie Lewis' dying declaration. The exclusion of Maggie Lewis' conclusion that "I am drunk," we do not think prejudicial or reversible error. *S. v. Layton,* 204 N. C., 704. Maggie Lewis' dying declaration in every detail was clear: First, she said she was shot. This was true. Second, "Do something for me, I am dying." This was true. Third, "she said she lived at 204 Cobb Street." This was not disputed. Fourth, "she knew she was at the Lincoln Hospital." Fifth, she said, "Isaiah Ham shot her near bridge," the jury so found. On the entire record, we find

No error.

SEMENAR MILLER v. W. S. MILLER.

(Filed 24 January, 1934.)

Divorce D a: Venue A d—Wife may sue for alimony without divorce in county of her residence.

A wife who has been forced by her husband to leave his home at night and take refuge elsewhere may acquire a separate domicile, and may sue him for alimony without divorce in the county of her residence, and the husband is not entitled to removal to the county of his residence as a matter of right. C. S., 469, 1657, 1667.

STACY, C. J., concurs in result.

APPEAL by defendant from *Sink, J.*, at August-September Term, 1933, of GUILFORD.

The plaintiff brought suit in the municipal court of the city of High Point in Guilford County, under C. S., 1667, for alimony without divorce. The defendant moved for removal of the cause to Vance County for the alleged reason that both parties reside there. Evidence was offerd by each party and the clerk of the municipal court denied the motion. On appeal the judge of the municipal court found as a fact that the plaintiff is a resident of High Point in Guilford County and denied the motion for removal. An appeal was then taken to the Superior Court and Judge Sink affirmed the judgment. Whether his ruling is correct is the only question in the record. The defendant excepted and appealed.

Garland B. Daniel for appellant.
Walser & Casey for appellee.

ADAMS, J. It is alleged in the complaint that the defendant forced the plaintiff to leave his home at night and that she was compelled to take refuge in the home of a neighbor. Under these circumstances she could acquire a separate domicile. *Rector v. Rector,* 186 N. C., 618; *S. v. Beam,* 181 N. C., 597.

The venue of an action is a matter of statutory regulation. C. S., 463, *et seq.* Among these statutes section 469 is the only one which has direct bearing on the motion. It provides that "in all other cases" the action must be tried in the county in which the plaintiffs or the defendants, or any of them reside; and in section 1657 it is said that in all actions for divorce the summons shall be returnable to the court of the county in which either the plaintiff or the defendant resides. In a proceeding for alimony without divorce (C. S., 1667) "the wife may institute an action in the Superior Court of the county in which the cause of action arose";

but in *Rector v. Rector, supra,* the Court held that the word "may" is permissive and not mandatory. Sustaining an action brought by the wife in a county other than that of the husband's residence the Court said: "The Legislature cannot reasonably be supposed to intend that a wife who is forced to go elsewhere than her husband's domicile to obtain food and shelter must bring an action in the county where her husband resides, and which she was forced to leave, and which he could change at will. She had a right, even under the agreement, to live where she desired. The defendant was to furnish subsistence and support to his wife wherever she lived, which in this case was Buncombe County. Her means are limited, and the cause of action actually arose in Buncombe, for it is the duty of a debtor to make payment at the home of the creditor, and on failure to do so, the cause of action arose there." Judgment

Affirmed.

STACY, C. J., concurs on the ground that the municipal court of the city of High Point, unless it be a court of general jurisdiction, has no authority to remove a cause to the Superior Court of any county other than Guilford. Chap. 699, Public-Local Laws, 1927; 27 R. C. L., 779; *Lewellyn v. Lewellyn,* 203 N. C., 575.

Speaking to the right of a municipal court to grant a change of venue in the absence of statutory authority, it was said in *Franken v. State,* 190 Wis., 424, 209 N. W., 766: "Proceedings for change of venue are statutory in their origin, and, where no statutory provision exists authorizing a change, the right thereto is nonexistent."

To like effect is the language of the Court *In re McFarland,* 223 Mo. App., 826, 12 S. W., (2d), 523: "The question is whether a change of venue may be taken from the juvenile court, which is a division of the circuit court, in a proceeding for the adoption of a minor child, pending before such juvenile court. It is fundamental that the right to a change of venue does not exist in this state except by statutory enactment. *Heather v. Palmyra,* 311 Mo., 32, 276 S. W., 872, *loc. cit.,* 875."

Similar holdings may be found in *Hale v. Barker,* 70 Utah, 284, 259 Pac., 928, and *Tucker v. State,* 35 Wyo., 430, 251 Pac., 460.

It is conceded that a court of general jurisdiction, such as our Superior Courts, may have inherent power, even in the absence of express statutory authority, to order a change of venue. *Crocker v. Justices,* 208 Mass., 162, 21 Ann. Cas., 1061, and note; 27 R. C. L., 810. And it may be contended that the municipal court of the city of High Point has such jurisdiction. Sec. 5, subsection (m), chap. 699, Public-Local Laws, 1927, provides:

"That the rules of practice as prescribed by law in the Superior Court for the trial of all causes shall apply to the High Point municipal court; . . . that wherever the statute provides for a thing to be done or a thing may be done in connection with the trial of an action in said court by the clerk of the Superior Court or by the judge of the Superior Court or by either, the same thing shall be performed by the clerk of the High Point municipal court or by the judge of the High Point municipal court, the clerk of said court, however, having no more powers and authorities with respect thereto than that as now given to clerks of the Superior Court."

Change of venue may be ordered by the Superior Courts in certain cases as provided by C. S., 469-470. All motions to remove as a matter of right are now made before the clerk. C. S., 913(a).

But without regard to the power of the court to order a change of venue, whether the plaintiff is in the proper court, while not now before us, may arise hereafter. C. S., 1667; *Hendrix v. R. R.*, 202 N. C., 579, 163 S. E., 752.

MARY W. KISTLER, TRUSTEE, ET AL., v. WILMINGTON DEVELOPMENT COMPANY ET AL.

(Filed 24 January, 1934.)

1. **Mortgages C d—Mortgagee is not ordinarily entitled to rents and profits until entry or institution of suit to foreclose.**

   Ordinarily the mortgagee is not entitled to rents from the mortgaged premises until entry is made or suit for foreclosure is begun, although as between the mortgagor and mortgagee equity may make the mortgage a charge upon the rents and profits when the mortgagor is insolvent and the security is inadequate.

2. **Same—Petition of mortgagee to be allowed to collect rents and profits held properly denied in this case.**

   Where a receiver has been appointed to take possession of all property and assets of an insolvent corporation, manage same and collect all rents and profits and preserve the assets for the benefit of creditors, and is given power to allow in his discretion the holders of mortgages against the property of the corporation to collect rents and profits from the specific land covered by their mortgages to the extent of delinquent interest, a petition filed in the Superior Court by one of the mortgagors to segregate rents and profits from the land covered by his mortgage for his benefit is properly denied where it appears that the mortgagee had failed to institute foreclosure proceedings although the mortgage debt was past due and it does not appear that he had requested leave of the receiver to make such collections and had been refused.

3. **Mortgages H b — Equity may forbid foreclosure of mortgages on property of insolvent placed in receiver's hands for preservation of equities.**

Where in a judgment appointing a receiver for an insolvent corporation the facts found support the conclusion of the court that the corporation could not protect the property and pay claims of unsecured creditors, and that for the benefit of all parties it was necessary to protect assets and preserve equities and to prevent interference with the property by foreclosure, etc., the court's order prohibiting foreclosure suits except by leave of court will not be disturbed, it appearing that the order was governed by a sound and judicial discretion.

APPEAL by Ham Estates, Incorporated, from *Stack, J.*, at May Term, 1933, of GUILFORD. Affirmed.

The Wilmington Development Company, a corporation, issued certain shares of preferred stock, the payment of which to the holders thereof or the redemption of stock at par was on 1 January, 1927, guaranteed by five persons who are, or whose representatives are, parties defendant. In January, 1933, the plaintiffs brought suit against these and other defendants, including the Wilmington Development Company, to recover the sums due the respective holders of the preferred stock, to set aside certain transfers of property alleged to have been made fraudulently, and to appoint receivers for certain of the defendants.

On 2 February, 1933, R. W. Harrison and T. D. Dupuy were appointed permanent receivers of the Wilmington Development Company and were directed to possess and control all its property, assets, books, papers, and records. T. D. Dupuy was made permanent receiver of the assets of J. W. Brawley, one of the defendants. The receivers were directed within five months to file an itemized statement of the property and the encumbrances on it. All persons, firms, and corporations were enjoined from interfering with the property and assets in the hands of the receivers, and from bringing any action against the receivers and from foreclosing any mortgage or deed of trust on property held by the receivers, without leave of court first obtained. The receivers were authorized to continue the business of Brawley and of the Wilmington Development Company, if for the best interest of creditors, to collect rents, to pay for repairs, to settle unpaid taxes and premiums on insurance policies, etc., and in their discretion after an investigation in each case to permit any person holding a mortgage or deed of trust on any real property to collect the rents from such property to the extent of the overdue interest on such mortgage or deed of trust and apply the same on such overdue interest.

On 1 November, 1929, the Wilmington Development Company executed three promissory notes aggregating $33,160, payable 1 November, 1930, and secured their payment by a deed of trust to David J. White, trustee, on property in the city of Wilmington. One of these notes in the amount of $17,160 was held by the Ham Estates, Incorporated. On the same property there was a prior deed of trust to the Massachusetts Mutual Life Insurance Company securing $55,000. The property was leased to Sears-Roebuck Company for a monthly rental of $800.

The Ham Estates, Incorporated, filed a petition in the cause on 14 February, 1933, alleging that it held the note for $17,600 referred to above and prayed the court to direct the receivers to segregate the income and rents of the property described in the deed of trust dated 1 November, 1929, and after the payment of expenses and prior charges on the property to apply the remainder pro rata to the payment of the interest and principal of the note held by the petitioner. The petition was denied and the petitioner excepted and appealed.

Herbert S. Falk for appellant.
R. C. Kelly and Sapp & Sapp for appellees.

ADAMS, J. The Ham Estates, Incorporated, holds one of three notes executed and delivered on the first day of November, 1929, to David J. White, trustee, by the Wilmington Development Company and secured by a deed of trust on real property situated in the city of Wilmington. On 2 February, 1933, this company went into the hands of receivers duly appointed by the Superior Court and on 14 February, 1933, the Ham Estates, Incorporated, filed its petition for the segregation of the income and rents of the property described in the deed of trust.

In the absence of a stipulation to the contrary a mortgagor of real property who is permitted to retain possession is entitled to the rents and profits. *Credle v. Ayers,* 126 N. C., 11. As between the mortgagor and the mortgagee equity makes the mortgage a charge upon the rents and profits when the mortgagor is insolvent and the security is inadequate (*Carr v. Dail,* 114 N. C., 284), but the prevailing rule is that a mortgagee is not entitled to rents until entry is made or a suit for foreclosure is begun. *Killebrew v. Hines,* 104 N. C., 182; *Parker Co. v. Bank,* 204 N. C., 432. In the latter case it was held that the mortgagee's right to collect the rents and income of mortgaged property arises only after the mortgagee or trustee has taken possession either by consent or by an order or decree of the court. There a receiver had been appointed in an action for the foreclosure of the mortgage and as the amount realized from a sale of the property was not sufficient to pay the mortgage debt the rents were properly applied in payment of the deficiency.

In the present case the facts are entirely different. The petitioner had the right to institute an action on 1 November, 1930, for the foreclosure of the deed of trust by which its note was secured but it has never made entry or brought suit for this purpose and therefore is not entitled as a legal right to the segregation of the rents. Furthermore, it is expressly provided in the order of the court that the receivers of the Wilmington Development Company may in their discretion authorize any party holding a mortgage or deed of trust on real estate to collect the rent from such property and apply it in payment of overdue interest. It does not appear that the petitioner has requested leave to make such collection or that permission has been denied.

The appellant insists that the court may not refuse a foreclosure of the deed of trust securing its note when the company which executed the deed is in the hands of receivers. In the order appointing the receivers it is found that defendants in the action could not protect the property and pay the claims of unsecured creditors; and that for the benefit of all parties it was necessary to protect assets and preserve equities, to prevent interference with the property by foreclosure or by suits against the receivers except by leave of the court, to collect rents, to perform other prescribed duties, and to file an itemized and detailed list of the assets of the Development Company and the encumbrances thereon.

The facts found by the court justify the conclusion that its order was essential to the promotion of justice and to the protection of legal and equitable rights and that no other remedy was adequate to the attainment of these ends. In these circumstances the action of the court was apparently governed by a sound, judicial discretion with which the courts are reluctant to interfere. Judgment

Affirmed.

MAUDE SAMS v. HOTEL RALEIGH, INCORPORATED.

(Filed 24 January, 1934.)

1. **Negligence A c—Held: there was no evidence of defective construction or negligent maintenance of steps, and nonsuit was proper.**

In order for an invitee to recover of the owner or lessor of a building for injury resulting from a fall on the steps in the building it is necessary to show defective or negligent construction or maintenance of the steps and the owner's or lessor's express or implied notice thereof, and where the invitee testifies that she constantly used the steps and that there was nothing unusual in their construction, and that she had never noticed anything wrong with them or loose on them, a nonsuit is correctly entered in her action to recover for injuries sustained in a fall when the heel of her shoe caught in an ordinary metal strip on the edge of the steps.

2. Appeal and Error J e—Exclusion of evidence under facts of this case held not prejudicial.

Where in an action to recover for injuries sustained in fall on steps in building a nonsuit is correctly entered for plaintiff's failure to establish defective construction or negligent maintenance of steps, the exclusion of evidence that other guests in the building had fallen on the steps becomes immaterial.

CIVIL ACTION, before *Cranmer, J.,* at Second June Term, 1933, of WAKE.

The plaintiff had a room in the defendant hotel and alleged that on 30 January, 1933, at about the hour of 9:30 p.m. she came out of her room on the third floor of said hotel with the intention of descending the stairs between the third and second floors for the purpose of going to the room of the assistant manager of said hotel, who was ill, to inquire as to his condition and to secure the teaspoons from his tray which would be needed for his early breakfast, said meal to be furnished from the coffee shop operated by this plaintiff. The plaintiff had descended within about seven steps of the second floor when the heel of her left shoe became caught and hung in the edge of a metal strip which the defendant had tacked on the outer edge of one of the steps of said stairs for the purpose of holding the carpet firmly on said stairs; that the defendant had carelessly, recklessly and negligently allowed the said metal strip to protrude upward on the step to such an extent that a person's shoe might be caught in the knife-like edge thereof; that the heel of plaintiff's left shoe caught in the edge of said metal strip so firmly that the shoe was forced off plaintiff's foot and the heel off the shoe; that the tripping . . . over the protruding edge of said metal strip caused her to lose her balance and to fall down the remaining six steps on the way to the second floor.

Plaintiff testified: "I thought the steps were all right and as I stepped down my foot caught. I grabbed and tried to release my foot and heel. The brass strip caught in my heel and as I went to release my foot my heel pulled down and caught underneath my instep. It is nothing unusual to have brass strips on the edge of steps. The brass, according to my best judgment, extended about one inch from the outer edge. I don't think there was anything unusual about the width of the steps, just like all steps going down in hotels and everywhere else. There was nothing unusual in their construction. . . . I did not have my hand on the rail then because I don't usually hold a rail as I go down, but when my foot caught I grabbed the handrailing. I stopped when I grabbed the handrailing to release my foot. Then the strip went into my heel. . . . While Mr. Robinson was sick I had used the steps that I fell on. I believe the steps are about the same in the day as the night. I used them up and down. I think they are lighted as well in the day time as the night and the night as well as in the day time. I cannot say I ever noticed anything wrong with the steps on the numerous occasions I had used them. . . . I had never observed anything in the world wrong with them. I had never noticed anything loose on the steps. I was rushing up to see how he was. On going back to my business . . . I went up those identical steps practically every day while Mr. Robinson was sick. I did not notice anything wrong about the steps. I did not observe anything loose."

There was evidence that the steps were "good, wide steps about 11 or 12 inches wide. There was a nice normal distance between them and were easy steps to walk on, very easy. There was a nice velvet carpet to walk on. There was a broad surface to walk on. They were kept clean and free from obstructions. They were clean at all times."

The plaintiff proposed to offer evidence to the effect that another person in the hotel had fallen on the stairway leading from the fourth to the fifth floor. This evidence was excluded by the court.

The plaintiff also proposed to show by a witness that, in November preceding the injury to plaintiff, in descending from the third to the second floor that she hung her toe "under the brass strip which tripped me, but I had my hand on the rail and held on and did not fall completely down. When I reached the office I told Mr. Pate I hung the toe of my shoe in one of the brass strips nailed along the edge of the stairway and had come very near falling." This evidence was excluded by the court and other evidence of like tenor.

At the conclusion of plaintiff's evidence a judgment of nonsuit was sustained and the plaintiff appealed.

Bunn & Arendell for plaintiff.
Clyde A. Douglass and Joseph C. Douglass for defendant.

BROGDEN, J. The duty imposed upon owners or lessors of buildings to employees and invitees with respect to steps is discussed and pronounced in *Farrell v. Thomas & Howard Co.,* 204 N. C., 631; *Batson v. Laundry, ante,* 93, and *Bohannon v. Stores Co.,* 197 N. C., 755, 150 S. E., 356.

In order to establish a breach of duty so imposed the injured party must offer evidence tending to show (a) defective or negligent construction or maintenance; (b) express or implied notice of such defects. *Blevins v. Cotton Mills,* 150 N. C., 493, 64 S. E., 428; *Orr v. Rumbough,* 172 N. C., 754, 90 S. E., 911; *Craver v. Cotton Mills,* 196 N. C., 330, 145 S. E., 570. The plaintiff testified that "there was nothing unusual in their construction. . . . I cannot say that I ever noticed anything wrong with the steps on the numerous occasions I had used them. I had never observed anything in the world wrong with them. I had never noticed anything loose on the steps."

Applying the accepted principles of law, it appears that there was no evidence of defective construction or negligent maintenance. Consequently, the plaintiff is not entitled to recover, and the judgment of nonsuit was correct. Hence exceptions relating to the exclusion of evidence that other guests in the hotel had fallen upon steps therein became immaterial. See *Dorsett v. Mfg. Co.,* 131 N. C., 254, 42 S. E., 612; *Conrad v. Shuford,* 174 N. C., 719, 94 S. E., 424; *McCord v. Harrison-Wright Co.,* 198 N. C., 742, 153 S. E., 406.

Affirmed.

STATE v. W. C. T. CARTER.

(Filed 24 January, 1934.)

1. **Municipal Corporations H a—**

   A city has the power to provide by ordinance for the proper regulation of the use of its streets. C. S., 2787 (71), (31).

2. **Municipal Corporations H d—Ordinance prohibiting parking of motor vehicles along designated part of street held reasonable and valid.**

   A city ordinance prohibiting parking of automobiles on one side of a street on certain blocks where, because of the narrowness of the street, there is insufficient room for cars to pass between parked cars and a street-car track in the street, *is held* reasonable and valid, the ordinance being necessary to prevent obstruction of the street and not applying to stopping of vehicles for the unloading of passengers or merchandise.

3. **Same: Highways A e—**

   The word "park" as used in regulations of motor vehicles means allowing such vehicles to remain standing on a public highway or street while not in use.

APPEAL by defendant from *Sink, J.,* at September Term, 1933, of GUILFORD. No error.

The defendant was tried and convicted, first in the municipal court of the city of High Point, and, second on his appeal from the judgment of the municipal court, in the Superior Court of Guilford County, of a violation of an ordinance of the city of High Point.

From the judgment of the Superior Court, that he pay a fine of $50.00, and the costs of the action, the defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

C. A. York for defendant.

CONNOR, J. Some time prior to 27 June, 1933, the city council of the city of High Point adopted and passed an ordinance providing that "it shall be unlawful for any person, firm or corporation to park any automobile, truck or other motor driven vehicle on the north side of English Street between College Street and Phillips Street" in said city. This ordinance was in full force and effect, according to its terms, on 27 June, 1933.

The evidence for the State at the trial in the Superior Court showed that between the hours of one and two o'clock, p.m., on 27 June, 1933, the defendant's automobile was standing on English Street, in front of defendant's store, which is located on the north side of English Street, between College Street and Phillips Street, in the city of High Point, and that a police officer of said city requested the defendant to move said automobile from the north side of English Street to the other side of said street. The defendant refused to comply with this request on the ground that the ordinance which the police officer was endeavoring to enforce was void, for the reason, first, that the city council had no power to adopt and pass the said ordinance, and second, that the ordinance is unreasonable in its terms and provisions. The automobile thereafter remained standing on the said street in front of defendant's store for more than fifty minutes, during which time the automobile was not used for any purpose by the defendant or by any one else. All the evidence showed that the defendant wilfully violated the ordinance. The motion of the defendant, at the close of all the evidence, for judgment dismissing the action, was properly denied, unless, as contended by the defendant, the ordinance is void.

The city of High Point, a municipal corporation of this State, had ample power to adopt and pass the ordinance. Such power is expressly conferred upon said city by statute. C. S., 2787(71) and (31). The ordinance is a proper regulation by the city of the use of its streets, and is not void for want of power in the city council to adopt and pass it.

The ordinance is not unreasonable. The evidence shows that English Street is 28 feet wide, that a street-car track extends along the middle of said street, and that when an automobile is standing against the curb on the north side of said street, between College Street and Phillips Street, traffic on said street is obstructed. The ordinance was adopted and passed in order that by its enforcement traffic on English Street, between College Street and Phillips Street, should not be obstructed by the parking of an automobile, a truck or a motor driven vehicle on the north side of English Street. The ordinance does not prohibit the stopping of an automobile, a truck, or a motor driven vehicle in the street, for the purpose of discharging or taking on passengers, or of loading or unloading goods, wares or merchandise.

There was no error in the instruction of the court to the jury as to the meaning of the word "park," as used in the ordinance. This word is in general use, with reference to motor driven vehicles, and means the permitting of such vehicles to remain standing on a public highway or street, while not in use. 42 C. J., 613. C. S., 2621(66).

All the evidence at the trial of this action shows that the defendant parked his automobile on English Street, between College Street and Phillips Street, in violation of a valid ordinance of the city of High Point.

There was no error in the trial of the action. The judgment is affirmed.

No error.

ARCHER-DANIELS-MIDLAND COMPANY v. SOUTHERN PAINT AND GLASS COMPANY ET AL.

(Filed 24 January, 1934.)

1. **Appeal and Error E g—**

The record on appeal imports verity.

2. **Appeal and Error E b—**

Where the evidence is not in the record and there is nothing therein to show that the charge of the court was erroneous, the charge will be presumed correct.

3. **Guaranty C c: Payment B b—Creditor held entitled to apply payment to unsecured debt as against guarantors of debtor.**

The creditor received payment from the debtor and applied same to the debtor's unsecured note and not to the debt guaranteed by defendants. *Held,* as between the creditor and the guarantors the creditor had the right to so apply the payment.

APPEAL by W. K. Rand and C. F. Delamar from *Devin, J.,* and a jury, at September Term, 1933, of DURHAM. No error.

On 15 June, 1929, the plaintiff and defendant Southern Paint and Glass Company entered into a contract whereby the plaintiff agreed to consign and deliver a stock of linseed oil to the said defendant, providing that the stock so sold and delivered would be replenished from time to time. The contract provided that the Southern Paint and Glass Company should make weekly written reports of the oil sold or used—the same to be then invoiced at the price in force at the time, the said invoices to be payable in thirty days.

The following guaranty was made:

"Southern Paint and Glass Company, Incorporated.
Wholesale and Retail Paint Merchants, Glass and Builders' Specialties.
Phone J-1241—105 Parrish Street.

West Durham, N. C., 3 June, 1929.

Archer-Daniels Midland Co., Minneapolis, Minn.

Gentlemen: We, the undersigned, agree to guarantee the account of the Southern Paint and Glass Company to Archer-Daniels Midland Company up to the sum of $3,000.

This is to cover the initial shipment of one carload of raw oil (70) drums on consignment. C. F. Delamar, E. C. Smith, W. K. Rand."

(Filed—12/30/30.)

The issue submitted to the jury and their answer thereto is as follows: "In what amount, if any, are the defendants, W. K. Rand and C. F. Delamar, indebted to the plaintiff? Answer: $301.50 and interest from 25 October, 1930."

Judgment was rendered on the verdict in the court below. The defendants made certain exceptions and assignments of error which will be considered in the opinion.

R. H. Sykes for plaintiff.
Hedrick & Hall for defendants.

CLARKSON, J. The evidence is not set forth in the record, but what is in the record imports verity. The defendants excepted and assigned error to the following portion of the charge below which cannot be sustained:

"The court charges you, if you find the facts to be true as testified, reduce the liability of the guarantors to $303.00, and it appears from examination of the account that there was an erroneous charge of $1.50, that is protest fees on a protested check which was charged twice, which would leave the amount $301.50, for which, if you find the facts to be true as testified, the guarantors would be liable."

This Court must take the charge as given to be correct as the evidence is not in the record and there is nothing to show on the record to the contrary.

The guaranty says "up to the sum of $3,000." The presumption from the record is that the $301.50 was within the $3,000 guaranty—we need not consider from the present record whether the $3,000 was a "continuing guaranty." This matter has been fully considered in *Novelty Co. v. Andrews,* 188 N. C., 59; *Presbyterian Board of Publication and S. S. Work v. Gilliford,* 139 Ind., 524; *Stagg v. Power Co.,* 171 N. C., 583.

The next exception and assignment of error to the charge cannot be sustained:

"It appears in evidence that subsequent to the filing of these pleadings and within the past few months that the plaintiff has received from the receiver of the Southern Paint and Glass Company, $97.00, but having the notes in the sum of $978.00, the court charges you that they would have the right to credit the $97.00 on those notes. So that if you find the facts to be true as testified and as shown by these admissions, you would answer this issue $301.50 with interest from 27 October, 1930."

We see no error in the application of the $97.00. *Stone v. Rich,* 160 N. C., 161; *Supply Co. v. Plumbing Co.,* 195 N. C., p. 633; *In re Bank,* 204 N. C., 472. 28 C. J. (Guaranty), p. 1005, in part is as follows:

"In accordance with the rules relating to the application of payments in general, where a creditor has several debts against another, or one debt consisting of different items, part of which is guaranteed, the guarantor, as a general rule, cannot control a payment made by the debtor or a fund in the creditor's hands belonging to the debtor, and require that it be applied to the part covered by his guaranty, especially where an agreement between the debtor and creditor provides for a different application. But the debtor in making payment may apply it to either debt, or part thereof, he chooses, provided this application is made at the time of payment; or if the payment is made generally without any designation as to where it is to be applied, the creditor may, as he elects, apply it to either a guaranteed or an unguaranteed debt."

We think that as between the plaintiff and these guarantors the plaintiff had the right to make the application. For the reasons given, we see no error in the judgment of the court below.

No error.

CLYDE F. FLEMMING, OWNER AND OPERATOR OF KENILWORTH BUS LINES, AND L. H. SPRINKLE AND W. R. SPRINKLE, OWNERS AND OPERATORS OF BEAVERDAM BUS LINES, v. THE CITY OF ASHEVILLE ET AL.

(Filed 24 January, 1934.)

1. **Appeal and Error J a—**

An exception to findings of fact by the court in injunction proceedings will not be sustained where the findings are supported by sufficient evidence.

2. **Municipal Corporations H e: Injunctions B c—Injunction held not to lie to prevent enforcement of ordinance in this case.**

This case *is held* to be controlled by the general rule that equity will not interfere by injunction to test the validity of a municipal ordinance and does not come within the exception that equity will enjoin a threatened enforcement of an alleged unconstitutional law when it is made manifest that otherwise irreparable injury will result to property or personal rights.

3. **Municipal Corporations H d—**

An ordinance requiring operators of motor busses within the city to file policies of liability insurance in solvent surety companies would seem to be valid.

APPEAL by plaintiffs from *Alley, J.*, at May Term, 1933, of BUNCOMBE. Affirmed.

This is an action to restrain and enjoin the defendants, the city of Asheville, its city manager and other officials, from enforcing against the plaintiffs, an ordinance of the city of Asheville on the ground (1) that the plaintiffs are not included within the terms and provisions of the ordinance; and, (2) that if plaintiffs are included within the terms and provisions of the ordinance, the said ordinance is void for that it contravenes certain provisions of the Constitution of the State of North Carolina, and of the United States.

When the action was called for trial on the issues raised by the pleadings, a trial by jury was waived, and it was agreed that the judge should hear the evidence, find the facts, and render judgment accordingly.

On the facts found by the judge, it was considered, ordered and adjudged that the plaintiffs are not entitled to an order restraining the defendants, the city of Asheville, its city manager and other officials, from enforcing against the plaintiffs its ordinances and laws relating to the operation of jitney busses, and that the restraining order heretofore issued in the action be and the same was dissolved. It was further ordered and adjudged that the plaintiffs pay the costs of the action to be taxed against the plaintiffs and the sureties on their prosecution bond.

The plaintiffs appealed from the judgment to the Supreme Court.

Edward H. McMahon for plaintiffs.
C. E. Blackstock and P. C. Cocke, Jr., for defendants.

CONNOR, J. On a former appeal by the plaintiffs from a judgment in this action, dissolving a temporary restraining order, the judgment was reversed and the action remanded to the Superior Court of Buncombe County for further proceedings in accordance with the opinion of this Court. *Flemming v. Asheville,* 203 N. C., 810, 167 S. E., 77. No findings of fact appeared in the judgment, and for that reason it could not be determined by this Court on what grounds the temporary restraining order was dissolved.

It now appears from the findings of fact set out in the judgment that the ordinance of the city of Asheville, which the plaintiffs contend is void, is applicable to the plaintiffs, for the reason that the plaintiffs are within its terms and provisions. The sole ground, therefore, on which plaintiffs now contend that they are entitled to the injunctive relief which they seek in this action is the invalidity of the ordinance. This relief was denied in the judgment from which the plaintiffs have appealed to this Court. The trial court was of opinion that on all the facts found from the evidence and set out in the judgment, the plaintiffs are not entitled to a judgment restraining the enforcement of the ordinance by the defendants. There was evidence sufficient to support each of the findings of fact. For that reason, plaintiffs' exceptions to certain findings of fact cannot be sustained.

The primary question presented by this appeal is whether this action is controlled by the general principle on which *Thompson v. Lumberton*, 182 N. C., 260, 108 S. E., 722, was decided, or falls within the exception to the principle applied in *Advertising Co. v. Asheville,* 189 N. C., 737, 128 S. E., 149. See *Loose-Wiles Biscuit Co. v. Sanford,* 200 N. C., 467, 157 S. E., 432, and cases cited in the opinion in that case.

We are of opinion that this action is controlled by the general principle that equity will not interfere by injunction to test the validity of an alleged unlawful or invalid municipal ordinance, and does not fall within the exception that equity will enjoin a threatened enforcement of an alleged unconstitutional law when it is made manifest that otherwise property rights or the rights of persons would suffer irreparable injury. For this reason, there is no error in the judgment.

Conceding that the ordinance which was adopted by the city of Asheville prior to the commencement of this action was invalid because it required all persons operating motor busses on the streets of Asheville to file with the city policies of insurance against liability to persons and property for damages resulting from their negligence, issued by a corporate surety company, authorized to do business in the State of North Carolina, as contended by the plaintiffs, it would seem that this ordinance has been repealed or superseded by the ordinance adopted by the city council of Asheville, on 20 April, 1933. This ordinance requires such persons to file policies of insurance issued by solvent sureties, and does not require that the sureties shall be corporations, authorized to do business in this State. The latter ordinance does not contain the requirement which the plaintiffs contend makes the former ordinance invalid. See *Plott v. Ferguson,* 202 N. C., 446, 163 S. E., 688. It would seem that the latter ordinance is valid. For the reason stated in this opinion, the judgment is

Affirmed.

CHARLES W. BUNDY, RECEIVER OF THE ESTATE OF G. A. MARSH, DECEASED, v. KATE HOUGH MARSH, INDIVIDUALLY, AND KATE HOUGH MARSH, EXECUTRIX OF THE ESTATE OF G. A. MARSH, DECEASED; LEX MARSH, JR., LEX MARSH COMPANY, A CORPORATION, AND THE MARSH LAND COMPANY, A CORPORATION.

(Filed 24 January, 1934.)

1. **Executors and Administrators C a—**

Equity has the power to appoint a receiver for the estate of a decedent in a pending action, and such receiver may thereafter maintain an action against the executor and others to recover for misapplication of funds and to recover funds so misapplied.

2. **Pleadings A a—Complaint alleging connected grounds for relief arising from same transaction or series of transactions is not demurrable.**

An action by the receiver of the estate of a decedent against the executrix in her representative capacity for failure to file accounts and mismanagement of the estate, etc., and against the executrix individually and an heir at law for the diversion of the funds to the heir and to corporations controlled by him, and against the corporation to recover assets of the estate thus wrongfully diverted to their use, states a cause of action in the nature of a creditors' bill for an accounting and the recovery of assets wrongfully disposed of, and the complaint is not subject to demurrer for misjoinder of parties and causes, since, construing the pleading as a unit, it relates a connected story arising out of the same transaction or series of transactions, setting up one general right of plaintiff, though the rights of defendants may be distinct.

CIVIL ACTION, before *Harding, J.,* at October Term, 1933, of MECKLENBURG.

The story told by the complaint is substantially as follows: G. A. Marsh died testate on 29 June, 1930. In his will he appointed the defendant, Kate Hough Marsh, executrix, and she duly qualified on 14 July, 1930. Prior to 4 October, 1932, suit was pending in the Superior Court of Mecklenburg, entitled J. M. Logan, receiver, and other creditors of the estate of G. A. Marsh *v.* Kate Hough Marsh, executrix, and Kate Hough Marsh, individually. On 4 October, 1932, the plaintiff Bundy was duly appointed receiver of the estate of G. A. Marsh, deceased, by an order made in the pending suit, which order was consented to by the attorneys for all parties, including Kate Hough Marsh. The defendant, Lex Marsh, Jr., is the son of the deceased, G. A. Marsh, and of Kate Hough Marsh, and Lex Marsh Company, a corporation, is dominated and controlled by Lex Marsh, Jr., who also had charge of the affairs of the defendant, Marsh Land Company. It was specifically alleged that "the affairs of the estate of G. A. Marsh, deceased, have been handled in one office under the direction and control of the defendant, Lex Marsh, Jr., and that said defendant . . . actively handled the turning over of the assets of said estate to himself and to the corporate defendants, and . . . that he is jointly responsible with the defendant, Kate Hough Marsh, for said acts and for the dissipation of the assets of the estate of G. A. Marsh, deceased; . . . that the corporate defendants are responsible to the extent to which they have received and used assets of said estate, and that the plaintiff is entitled to an accounting from all the defendants."

The complaint further alleges certain specific causes of action which may be summarized as follows:

1. The failure of the executrix to file annual accounts.
2. The diversion of the assets of the estate for the benefit of defendants.
3. Personal use of the funds of the estate by the executrix.
4. Unlawful expenditures for services by the executrix.
5. Improper sale of real estate owned by the deceased.
6. That the defendant, Marsh Land Company, holds or claims certain assets that belong to the estate and which the executrix should recover and administer to the benefit of the creditors.

The defendants demurred to the complaint upon the following grounds:

1. That the plaintiff has not legal capacity to sue for the reason that Kate Hough Marsh was the acting executrix of the will and has neither been discharged nor removed as such, and hence the receiver so appointed cannot maintain the action, particularly in view of the fact that he has no special or general authority to prosecute the same.
2. That the complaint disclosed a misjoinder of parties and causes of action in that certain causes of action are alleged against the executrix in her representative capacity and as an individual, together with certain causes of action for the recovery of funds alleged to have been paid to Lex Marsh, Jr., and to Lex Marsh Land Company, and that no specific amount of diverted funds or assets are set up in the complaint.

The trial judge overruled the demurrer and from such order the defendants appealed.

John M. Robinson and Hunter M. Jones for plaintiffs.
Fred B. Helms for defendants.

BROGDEN, J. The power of the court to appoint a receiver for the estate of a decedent in a pending action was recognized and applied *In re Estate of Wright,* 200 N. C., 620, 158 S. E., 192.

In arriving at a conclusion as to whether a misjoinder of parties and causes of action appears in a given complaint, the entire pleading must be construed as a unit. Interpreting the complaint in the present case, it is obvious that the suit brought by the receiver is in the nature of a creditors' bill for an accounting, including the recovery of assets of the estate wrongfully disposed of and for assets which should be applied to the claims of creditors. The governing principle is quoted in *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465, as follows: "If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end—if one connected story can be told of the whole, the objection cannot apply. And it has been held not to apply, when there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct. Nor will it apply when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights; and in such a case they may all be charged in the same bill, and a demurrer for that cause will not be sustained." See *Bedsole v. Monroe,* 40 N. C., 313; *Fisher v. Trust Co.,* 138 N. C., 225, 50 S. E., 659; *S. v. McCanless,* 193 N. C., 200, 136 S. E., 371. Many apposite decisions are reviewed in the *McCanless case, supra.* The cases cited and others of like tenor fully sustain the judgment.

Affirmed.

ROOSEVELT DICKERSON ET AL. v. MAMIE REYNOLDS.

(Filed 24 January, 1934.)

1. **Automobiles D b—Evidence held sufficient to sustain inference that driver was defendant's agent at time of collision.**

   Evidence that defendant's son called defendant on long distance, requested her to send her car to a certain town so that he might return to his home more quickly, which he desired to do because of his wife's sudden illness, that the son was of age and that at the time was not living with defendant, that the son occasionally used the car as a member of the family, and that in response to the call defendant sent her chauffeur with the car to the place designated and that on the journey the chauffeur had an accident resulting in injury to plaintiffs, *is held* sufficient to be submitted to the jury on the issue of whether the chauffeur was defendant's agent at the time, the evidence being sufficient to support an inference to that effect, and the inferences to be drawn from the evidence being for the determination of the jury.

2. **Trial D a—On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff.**

On motion as of nonsuit all the evidence which tends to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

APPEAL by defendant from *Shaw, Emergency Judge,* at May Term, 1933, of DAVIDSON.

Civil actions to recover damages for personal injuries to plaintiffs, and to the car in which they were riding, alleged to have been caused by the negligence of the defendant, and as the several causes of action arose out of the same collision, or the same state of facts, for convenience, they were consolidated and tried together. *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171; *Baker v. R. R., ante,* 329.

The essential facts are these: On 22 October, 1932, plaintiffs were injured, and the car in which they were riding was damaged, in a collision with defendant's automobile, operated at the time by Walter Aiken, defendant's chauffeur. For present purposes, it is conceded the evidence was sufficient to carry the case to the jury on the alleged negligence of Walter Aiken, but it is contended he was not the defendant's agent, or driving for the defendant, at the time of the collision.

The question of agency or liability is to be determined solely from the testimony of the defendant, who was called as a witness by the plaintiffs.

Her evidence is to the effect that she is the mother of Robert R. Reynolds; that she lives just outside the city of Asheville; that Walter Aiken was in her employ as butler, chauffeur and general utility man during the fall of 1932; that on the day in question, having received word her son's wife was critically ill, she immediately telephoned her son, who was away from home on a speaking tour, and acquainted him with the fact of his wife's illness. "In consequence of this message I sent the car with Walter Aiken to meet him after he got through speaking at some place near Lexington so he could get home earlier than he would if he had to go to Greensboro to take the train."

The defendant further testified: "At that time, my son was making his home in Asheville. He maintained an apartment there. He did not live with me just at that time. He was of legal age, 47 years old, and occasionally came and spent some time with me, but on this occasion he was not living with me. His regular home was my home. Prior to October, 1932, he had made his home for a long time with me, but just at that time he was living in the city. I had permitted or allowed my son, for his convenience, to use my automobile as a member of the family. He had made use of it occasionally for pleasure but not regularly. He was not using my car at the time to travel from one place to another in the State. With reference to whose mission the car was on—well, the nurse had phoned my son his wife was critically ill. Naturally, he was nervous and excited and wanted to get home as quickly as possible. He phoned and asked me to send Walter down to some point near Lexington—I have forgotten the town—with the car. My son was the one who phoned me. In consequence of this phone message, I called Walter and told him to take the car to my son at this point."

At the close of plaintiff's evidence, and again at the close of all the evidence, the defendant demurred and moved for judgment of nonsuit. Overruled; exception.

From verdicts and judgments for the plaintiffs, the defendant appeals, assigning as errors the refusal of the court to dismiss the actions as in cases of nonsuit.

Phillips & Bower and Spruill & Olive for plaintiffs.
Don A. Walser and Marcus Erwin for defendant.

STACY, C. J. Whose servant or agent was Walter Aiken at the time of the collision, the defendant's or her son's? The case turns on the answer to this question. It may be resolved either way by the record. This makes it a case for the jury. *Parrish v. Armour Co.,* 200 N. C., 654, 158 S. E., 188.

The rule is, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is "entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom." *Christman v. Hilliard,* 167 N. C., 4, 82 S. E., 949; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Hill v. Ins. Co.,* 200 N. C., 115, 156 S. E., 518; *Hamilton v. R. R.,* 200 N. C., 543, 158 S. E., 75.

We are not unmindful of the strength of the argument which points in the opposite direction, but the inferences to be drawn from the evidence are matters properly to be considered by the jury. *McGee v. Crawford, ante,* 318; *Grier v. Woodside,* 200 N. C., 759, 158 S. E., 491. It is ours only to determine whether the evidence is fit to be submitted to the twelve. Its credibility is for them. The cases cited and relied upon by the defendant are not controlling on the present record.

The learned judge who tried the cases thought the evidence sufficient to support the verdicts. His refusal to nonsuit the cases is supported by the apposite decisions on the subject.

No error.

L. T. WHITE v. K. B. JOHNSON AND SONS, INCORPORATED.

(Filed 24 January, 1934.)

Corporations G c—President has apparent power to sign note for corporation, and secret limitation on his powers will not bind payee.

Where in a suit on a negotiable note against the corporate maker the payee introduces in evidence the note signed in the name of the corporation by its president, with one payment of interest thereon, and testifies that he had loaned the money to the corporation and received the note as evidence of the debt, the exclusion of evidence offered by defendant on the plea of *ultra vires* that the money was used by the president for a personal obligation and that he had no authority to sign the note for the corporation is not error, C. S., 3004, 3008, 3041, 1145, the president of the corporation having implied power to sign the note and secret limitations on his authority not being binding on plaintiff, and the corporation having placed its president in a position to mislead plaintiff and cause the loss, and the corporation having ratified the act by payment of interest.

APPEAL by defendant from *Cranmer, J.,* at June Term, 1933, of WAKE. No error.

The complaint of the plaintiff, in part, is as follows: "That of date 3 November, 1931, the plaintiff, L. T. White, loaned to the defendant, K. B. Johnson and Sons, Incorporated, the sum of $2,000 in cash and as evidence of said indebtedness received from the defendant, K. B. Johnson and Sons, Incorporated, its promissory note of date 3 November, 1931, due in sixty days, and made for the principal sum of $2,000. That said note matured and became due on 2 January, 1932, and the plaintiff called on the defendants for payment. That payment was promised from time to time but up until this date no payment has been made, and the defendant, K. B. Johnson and Sons, Incorporated, are justly indebted to the plaintiff, L. T. White, in the full sum of $2,000, together with interest from 2 January, 1932, until paid." The defendant pleaded *ultra vires* and no authority.

The plaintiff's testimony was as follows: "That on 3 November, 1931, he lent $2,000 to K. B. Johnson and Sons, Incorporated, and received as evidence of the debt a note for $2,000, which was the note sued upon, said note being due sixty days after date.

Mr. White stated that nothing had been paid upon the note, except one payment of interest to 2 January, 1932. The plaintiff offered the note in evidence and rested."

The defendant offered certain evidence which was excluded by the court below, which will be considered in the opinion. The court below charged the jury as follows:

"The plaintiff is Mr. L. T. White and the defendant is K. B. Johnson and Sons, Incorporated. The plaintiff sues on a certain promissory note, which has been introduced in evidence in the sum of two thousand dollars, dated 3 November, 1931, and due sixty days after date. The only issue is: 'What sum, if any, is the defendant indebted to the plaintiff?'

If you find, gentlemen, by the greater weight of the evidence the facts to be as the evidence tends to show, I instruct you to answer the issue, '$2,000 and interest from 2 January, 1932.' "

The issue and answer of the jury thereto was as follows:

"In what amount, if any, is defendant indebted to plaintiff? Answer: $2,000 and interest from 2 January, 1932."

The defendant made certain exceptions and assignments of error which will be considered in the opinion.

Bunn & Arendell for plaintiff.

A. J. Fletcher and John W. Hinsdale for defendant.

CLARKSON, J. The note in controversy was signed, "K. B. Johnson and Sons, Incorporated, by K. B. Johnson, president." The note was for $2,000. Payable at 60 days. Nothing has been paid on the note except one payment of interest to 2 January, 1932. The plaintiff testified that "he lent $2,000 to K. B. Johnson and Sons, Incorporated, and received as evidence of the debt a note for $2,000."

C. S., 3004: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

C. S., 3008: "Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise."

C. S., 3041: "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

The defendant did not set up the plea of payment, fraud or mutual mistake. The defendant attempted to show (1) that the money received from plaintiff was to pay a note of the Hanover Land and Timber Company, endorsed by K. B. Johnson and others; (2) that K. B. Johnson, the president of defendant's company had no authority to execute the note sued on. This evidence was excluded by the court below and defendant excepted and assigned errors. We think the court below was correct in excluding this evidence.

In *Beck v. Wilkins-Ricks Co.,* 186 N. C., 210 (214), we find: "C. S., 1145, says: 'Every corporation organized under this chapter shall have a president, secretary and treasurer, etc.'

Under the facts in this case, we are of opinion that L. P. Wilkins, secretary and treasurer of defendant corporation, had a right to make the promise, and it was in the implied scope of his employment. The business of the corporation could not be successfully carried on if he was so limited that in transactions of this kind he had no authority. *Strickland v. Kress,* 183 N. C., 537; *Powell v. Lumber Co.,* 168 N. C., 632." *Lumber Co. v. Elias,* 199 N. C., 103. The interest was paid and the giving of the note was impliedly ratified. *Morris v. Y. & B. Corp.,* 198 N. C., 705.

In *Caldwell v. Garrison,* 179 N. C., 476 (478): "This being true, the legal title to these notes would, in our opinion, pass by the endorsements of the president of the company, notwithstanding the resolution of the directors establishing limitations upon his powers. Such endorsement being within the scope of his apparent powers, and coming under the accepted and wholesome rule that a principal who has clothed his agent with apparent authority to do an act may not repudiate such authority, and the effect of it by reason of private instructions or limitations uncommunicated or unknown to the other party."

"The president of a corporation is *ex vi termini* its general agent." *Trust Co. v. Transit Lines,* 198 N. C., 675 (679).

Another sound principle is applicable to the facts in this case in *Thompson v. Assurance Society,* 199 N. C., 59 (69).

"Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *R. R. v. Kitchin,* 91 N. C., at p. 44; *Bank v. Liles,* 197 N. C., at p. 418. In law, we find no error in the judgment of the court below.

No error.

C. H. SLATER, OPERATING AS C. H. SLATER AND COMPANY, AND THE CENTRAL INVESTMENT CORPORATION, v. NORTH CAROLINA BANK AND TRUST COMPANY AND GURNEY P. HOOD, COMMISSIONER OF BANKS FOR THE STATE OF NORTH CAROLINA.

(Filed 24 January, 1934.)

1. **Banks and Banking H e—Principals having equitable ownership of funds deposited by agent are not entitled to preference in bank's assets.**

The fact that an agent notifies a bank that a deposit made therein by him was made with moneys belonging to his principals in order to prevent the bank's right to equitable set-off of the funds against the amount due the bank by the agent does not entitle the principals to a preference in the bank's assets upon its later insolvency on the ground of their beneficial or equitable ownership of the funds, there being no agreement that the deposits should be segregated from general funds of the bank.

2. Same—

An agent notifying a bank that deposits made by him therein were made with moneys belonging to his principals is not entitled to a preference in bank's assets upon its later insolvency.

APPEAL by plaintiffs from *Sink, J.*, at August Term, 1933, of GUILFORD. Affirmed.

Action without controversy upon an agreed statement of facts. C. H. Slater, who was collecting agent of the Central Investment Corporation and other principals, opened an account with the North Carolina Bank and Trust Company in the name of C. H. Slater and Company. In August, 1932, C. H. Slater notified the bank that C. H. Slater and Company was a trade-name and that the deposits were made in the trade-name to avoid the bank's right of set-off against this fund for Slater's personal obligations then held by the bank; that the money so deposited did not belong to him but to third parties; and that he was using such account for remittances by check to his several principals for rents collected and payments made on mortgage notes. He did not disclose the names of his principals. Funds of the Central Investment Corporation and others were deposited in the trade-name and for several months the various principals received stated settlements by checks drawn on the deposits. When money was deposited the bank issued general deposit tickets and mingled the funds with its general assets. There was no segregation and no other agreement between the bank and Slater or any of his principals. The bank did not know that the Central Investment Corporation exercised any right of ownership in the deposits and made no further inquiry as to the nature of the account. When the bank suspended business C. H. Slater and Company had on deposit $521.72 which was treated as an active checking account. The checks were signed in the name of C. H. Slater and Company by C. H. Slater. The appellants contend that the Central Investment Corporation is the beneficial owner thereof and is entitled to the deposit or, if not, that C. H. Slater and Company is entitled to a preference created by the deposit of a trust fund. The trial court dismissed the action and the plaintiffs appealed.

Stanley & Beeson for appellants.
Brooks, McLendon & Holderness for appellees.

ADAMS, J. It is admitted that the Central Investment Corporation is the beneficial owner of the funds deposited in the bank in the name of C. H. Slater and Company, and in view of this admission the appellants argue that the transaction between the depositor and the bank resulted in the creation of a trust which entitles the beneficial owner to precedence in payment. The argument is predicated on the theory of equitable ownership arising from the bank's knowledge of the fact that the funds deposited in the name of C. H. Slater and Company were free from the banker's right of legal or equitable set-off against C. H. Slater. The appellants cite several cases in support of the principle that a banker's lien or right of set-off while ordinarily attaching to deposited funds cannot be permitted to prevail against the equity of the beneficial owner of which the bank has notice, either actual or constructive. *Nat. Bank v. Life Ins. Co.,* 104 U. S., 54, 26 L. Ed., 693; *Union Stock Yards National Bank v. Gillespie,* 137 U. S., 411, 34 L. Ed., 724; *United States v. Butterworth-Judson Corporation,* 267 U. S., 387, 69 L. Ed., 672; *Arnold v. San Ramon Valley Bank,* 194 Pac., 1012, 13 A. L. R., 320, and annotation; *Agard v. People's Nat. Bank,* 169 Minn., 438, 50 A. L. R., 629, and annotation. Conceding the principle, we do not perceive its application to the agreed facts. The question of set-off or banker's liens is not presented by the appeal. When the deposits were made, general receipts or tickets were issued by the bank; there was no agreement that the deposits should be segregated from the general funds; and it is agreed that they remained subject to withdrawal by the depositor. The mere fact of beneficial or equitable ownership confers upon the Central Investment Corporation no right of precedence or preference in the distribution of assets in the hands of the Commissioner of Banks.

The appellants take the alternative position that the depositor of the funds is a preferred creditor of the bank and is therefore entitled to priority over the general creditors of the bank. Applying the principle stated in all the recent decisions dealing with the question of claims which have preference in the liquidation of an insolvent bank, we are of opinion that the appellants' position cannot be maintained on the theory of a segregated trust fund or of a statutory preference. *Williams v. Hood, Comr.,* 204 N. C., 140; *Flack v. Hood, Comr., ibid.,* 337; *Parker v. Trust Co.,* 202 N. C., 230; *Bank v. Corporation Commission,* 201 N. C., 381; *Hicks v. Corporation Commission, ibid.,* 819; *Corporation Commission v. Trust Co.,* 193 N. C., 696. Judgment

Affirmed.

THE HOOD SYSTEM INDUSTRIAL BANK OF HIGH POINT v. THE DIXIE OIL COMPANY AND D. O. CECIL AND D. L. CECIL, SURETIES.

(Filed 24 January, 1934.)

1. **Bills and Notes G a—Payee's surrender of note to maker and acceptance of another note amounts to cancellation not requiring writing.**

Where in an action on a note the maker and sureties rely on the discharge of the note by the payee's acceptance of the note of another party in the sum due, and the payee's delivery to them of the papers on which defendants were bound, the payee's objection to the introduction of a deposition of a witness bearing directly on the alleged contract on the ground that it tended to release a written instrument by parol and that the contract alleged was not in writing, cannot be sustained, the contract alleged being a discharge of the debt under C. S., 3101, by intentional cancellation by the payee which is not required to be in writing.

2. **Same—**

An instruction that a negotiable instrument may be discharged by any act which would discharge a simple contract for the payment of money is not error. C. S., 3101.

APPEAL by plaintiff from *Sink, J.*, at September Term, 1933, of GUILFORD. No error.

On 18 April, 1929, the defendants executed and delivered to the plaintiff their promissory note in the sum of $5,400, the payment of which the Dixie Oil Company secured by a deed of trust naming M. H. Folger as trustee. The trust was foreclosed, the sale was confirmed and the proceeds, less the cost of sale, together with another payment were credited on the note. The plaintiff brought suit to recover $4,043.95, the remainder claimed to be due.

In their answer the defendants allege that under an agreement with the plaintiff the Dixie Oil Company, more than a year before the foreclosure, sold to J. E. Marsh the property described in the deed of trust; that Marsh executed notes to the plaintiff, covering the amount of the Oil Company's indebtedness to the plaintiff; and that the plaintiff accepted these notes and discharged the defendants.

The defendants admitted that they executed their note to the plaintiff for $5,400, that proper credits had been entered on the note, that the amount due was $4,053.95 with interest from 28 April, 1932, and that if the defendants did not establish their claim of payment by the Marsh notes the plaintiff was entitled to judgment, less any usury that may have been charged.

The court dismissed the defendant's claim for usury and submitted one issue which was answered "Yes": "Was the note set out in the complaint paid by the delivery to the plaintiff of the Marsh notes, as alleged in the answer?"

In the municipal court of the city of High Point judgment was rendered for the defendants and on appeal to the Superior Court the plaintiff's exceptions were overruled and the judgment was affirmed. The plaintiff excepted and appealed.

David H. Parsons for appellant.
Walser & Casey for appellees.

ADAMS, J. Prior to the introduction of evidence the plaintiff made a motion to quash the deposition of Wray Farlow on the ground that the testimony of the witness was incompetent in that it was not a statement of facts but an argumentative conclusion of his own (C. S., 1819) by which, if believed, a written instrument would be released by parol. As to the first objection the court announced that the admissibility of the answer to each question would be determined when the deposition was offered, and in reference to the other, the defendant D. O. Cecil, who was a surety on the note, testified that when the cashier agreed to accept the Marsh notes in lieu of those given by the defendants the "bank delivered to me my papers and released the Dixie Oil Company," an act which was tantamount to a discharge of the debt or the intentional cancellation of the papers. C. S., 3101. According to this testimony the notes were delivered to the makers; they were not retained by the holder as in *Manly v. Beam,* 190 N. C., 659; and Farlow's deposition bore directly upon the contract which the defendants pleaded in bar of the plaintiff's recovery. Other exceptions were taken to evidence on the theory that the contract was not in writing; but the defense was a discharge of the debt under C. S., 3101, not the renunciation of a right under section 3104, although in the latter no writing is necessary if "the instrument is delivered to the person primarily liable thereon." The first sixteen exceptions which are directly or indirectly addressed to the same subject-matter must be overruled. The only others to which we need advert are those which have reference to instructions given the jury.

The seventeenth is directed to the court's statement of a paragraph in the answer, which is unobjectionable; the eighteenth, to the deposition of Farlow, which was properly admitted in evidence; the nineteenth, to the rule given as to the burden of proof, which was correct; and the twentieth, to an instruction correctly applying the principle that a negotiable instrument may be discharged by any act which will discharge a simple contract for the payment of money. C. S., 3101. The charge in our opinion was a sufficient compliance with the rule that the court should give the respective contentions of the parties and the law applicable thereto, as laid down in *S. v. Merrick,* 171 N. C., 788, and *Jarrett v. Trunk Co.,* 144 N. C., 299. The other exceptions are formal.

No error.

MAMIE HUNDLEY v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 24 January, 1934.)

Insurance R c: M e—Where liability under policy begins six months after proof of disability action instituted prior thereto is premature.

Where an insurance policy provides for payments to insured according to the stipulations in the policy six months after receipt of due proof of insured's disability as defined by the policy, a suit on the policy brought prior to the expiration of six months after the furnishing of due proof is premature and should be dismissed, and this result is not affected by insurer's denial of liability on the ground that insured had not become totally and permanently disabled during the life of the policy.

CIVIL ACTION, before *Moore, Special Judge,* at May Special Term, 1933, of ROCKINGHAM.

On 1 January, 1920, the Metropolitan Life Insurance Company issued a group one-year renewable term policy of insurance No. 726-G on the lives of employees of the Riverside and Dan River Cotton Mills, of Danville, Virginia. Sam H. Hundley, husband of the plaintiff, had been an employee of said mills for sometime and a serial certificate No. 6719 was issued to him as such employee. Mrs. Mamie Hundley, the plaintiff, was named beneficiary in the certificate. The master policy was renewed from time to time until its cancellation on 31 August, 1930. Sam H. Hundley died on 24 May, 1931, and on 20 October, 1931, the plaintiff filed with the insurance company an affidavit reciting the death of said Sam H. Hundley, and that "for some years prior to 31 August, 1930, the said Sam H. Hundley had been in bad health and was only able to work intermittently, and that on or about 25 August, 1930, the said Sam H. Hundley had a severe attack and was unable to report for work two days during the week of 25 August, 1930, and that the said Sam H. Hundley became permanently disabled while in the employ of the Riverside and Dan River Cotton Mills before reaching the age of sixty. That . . . he was permanently disabled to work and that he was thereby on or about 25 August, 1930, permanently, continuously and wholly prevented from pursuing any and all gainful occupation by reason of his then disabled condition," etc. The defendant admitted that it had received this notice.

It was alleged in the complaint that the certificate held by the deceased was for the sum of $1,500, and the plaintiff asked to recover said sum with interest from 24 May, 1931.

The defendant admitted the issuance of the group policy and its renewal from time to time until the cancellation on 31 August, 1930, and also that the deceased employee held the serial certificate referred to.

It denied that the employee had ever been permanently and totally disabled during the life of the policy.

When the case was called for trial in the Superior Court the defendant demurred *ore tenus* upon the ground that the complaint failed to state a cause of action. The trial judge withheld the ruling upon the demurrer and the trial proceeded. The policies of insurance were offered in evidence and there was abundant testimony tending to show that the employee became totally and permanently disabled prior to the cancellation of the group policy, and was continuously disabled until the time of his death on 24 May, 1931.

At the conclusion of plaintiff's evidence the trial judge sustained a motion of nonsuit, and also the demurrer *ore tenus.*

From judgment so pronounced, the plaintiff appealed.

P. T. Stiers for plaintiff.

Smith, Wharton & Hudgins for defendant.

BROGDEN, J. The serial certificate issued to Sam H. Hundley by the defendant contained the following provision: "Any employee insured under this plan, who shall become wholly and permanently disabled while in our employ, before reaching the age of sixty, either by accident, injury or disease, and is thereby permanently, continuously and wholly prevented from pursuing any and all gainful occupation, will be regarded as a claimant by the Metropolitan Life Insurance Company. Six months after the receipt of due proof of such disability, the insurance company will begin making payments of the amount of insurance under any one of the following plans at the option of the person insured," etc.

An analysis of the foregoing clause in the policy discloses that in order to recover, the plaintiff must offer competent evidence tending to show: (a) permanent disability as defined before age sixty; (b) due proof of such "disablement"; (c) that six months have elapsed since furnishing such proof, and that there has been a failure to pay. The record discloses that summons was issued on 3 November, 1931. The wording of the contract clearly specifies that the company shall not begin to make payments until six months after the receipt of the proof. Obviously, payment could not be enforced before the lapse of six months, and hence it follows that the action was prematurely brought. It is not deemed relevant to discuss the meaning of the six months' clause or for what reason it was inserted in the contract. It is there in plain English. Nor is the fact that the defendant denied liability material for the reason that the parties had contracted to postpone payments until six months after the receipt of proof.

Affirmed.

MRS. HENRIETTA MATTHEWS WRAY, MOTHER OF WM. J. MATTHEWS, DECEASED, AND RUBY WRAY, SISTER, V. CAROLINA COTTON AND WOOLEN MILLS COMPANY, EMPLOYER, AND ÆTNA LIFE INSURANCE COMPANY, CARRIER.

(Filed 24 January, 1934.)

1. **Master and Servant F c—**

   The claim of an injured employee under the Compensation Act is barred if not filed within one year of the accident.

2. **Same—Claim of dependents for employee's death is not barred if filed within one year after death of employee.**

   Where the claim of an employee under the Compensation Act is dismissed because not filed within one year of the accident, and pending appeal the employee dies as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death is not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an original right enforceable only after his death. Chapter 120, sec. 24, Public Laws of 1929.

3. **Master and Servant F d—**

   Evidence taken before the Industrial Commission upon a claim of an injured employee is competent in proceedings by his dependents to recover compensation for his death later resulting from the accident.

4. **Master and Servant F i—**

   Where there is ample evidence to support the claim of dependents of an employee the findings of the Industrial Commission upon which an award is made are conclusive on the courts.

APPEAL by respondents from *Moore, Special Judge,* at May Special Term, 1933, of ROCKINGHAM. Affirmed.

This is a proceeding under the North Carolina Workmen's Compensation Act. William J. Matthews, an employee of the Carolina Cotton and Woolen Mills, was injured about 9 p.m. on 28 November, 1930. While engaged in running a slashing machine he pulled a lever which was supported by a chain; the chain broke and the lever fell on his left leg and injured it two or three inches above the knee. His leg was amputated. There was evidence that his death resulted from the accident.

The Industrial Commission was first notified of the injury on 12 April, 1932. The case was heard by one member of the Commission on 25 July, 1932, and was dismissed on 15 August, 1932, for the reason that the claim had not been filed with the Commission within one year after the accident. Workmen's Compensation Act, section 24. The claimant appealed but died before the appeal could be heard by the Commission.

His death occurred on 24 August, 1932, and on 8 September, 1932, his dependent mother, Mrs. Henrietta Matthews Wray, filed with the Industrial Commission her claim for compensation and requested a further hearing to determine the question of depenency. He left surviving him his mother and sister as his dependents.

This claim was heard by one member of the Commission who allowed the dependents compensation and upon appeal to the full Commission the award was approved. Appeal was then taken to the Superior Court and the findings of fact, conclusions of law, and the award of the full Commission were adopted by the court and in all respects affirmed. The respondents excepted and appealed.

King & King for appellants.
H. L. Fagge, B. W. Walker and James B. Fagge, Jr., for appellees.

ADAMS, J. The amendment of section 24 of the Workmen's Compensation Act was ratified on 12 May, 1933, and the opinion of the Industrial Commission was filed on 7 March, 1933. At the latter date section 24 read as follows: "The right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter." Public Laws, 1929, chap. 120, sec. 24.

William J. Matthews, the employee, was injured on 28 November, 1930, and filed his claim with the Industrial Commission on 12 April, 1932. The claim, therefore, was not filed "within one year after the accident," and for this reason it was dismissed. The limitation of time prescribed by the statute is mandatory and must be observed. 2 Schneider, Workmen's Compensation Law, 1904, sec. 545; Minor, Workmen's Compensation Laws, 310; *Kalucki v. Am. Car. & Foundry Co.,* 166 N. W. (Mich.), 1011; *Bushnell v. Industrial Board,* 114 N. E. (Ill.), 496.

Within a month after the death of the employee his dependents filed with the Commission a claim for compensation and it was allowed. The appellants contest the validity of this award mainly on the ground that the claim prosecuted by the dependents was in the nature of an amendment to the proceeding begun by the employee and that an amendment could be made only by consent; that the order dismissing the employee's claim was final and exclusive; and that the limitation which barred the employee bars his dependents. We do not regard this as a legitimate deduction.

With respect to the claim of the employee it may be granted that as to him the order denying relief was conclusive; but during his lifetime his dependents were not parties in interest to the proceeding he brought for the enforcement of his claim. Their right to compensation did not arise until his death and their cause of action was not affected by anything he did, not even to the extent of a reduction of their compensation by payments sought by him, because no such payments were made. The basis of their claim was an original right which was enforceable only after his death. *Curtis v. Slater Const. Co.,* 168 N. W. (Mich.), 958; *Giannotti v. Giusti Bros.,* 102 Atl. (R. I.), 887.

It is suggested that the evidence which was heard in reference to the claim of the employee was not competent in behalf of the dependents; but both claims originated in one accident and all the evidence relating to the accident and injury, the employment, the date and cause of the death, and other circumstances were matters of record and were proper subjects of investigation. There was ample evidence in support of the dependents' claim and we are concluded by the facts as found by the Commission. *Clark v. Woolen Mills,* 204 N. C., 529; *Johnson v. Bagging Co.,* 203 N. C., 579; *Aycock v. Cooper,* 202 N. C., 500. Judgment

Affirmed.

STATE v. D. O. TATUM.

(Filed 24 January, 1934.)

Bills and Notes D f—Check given under agreement that payee should hold it to future date does not come within provisions of "bad check law."

A check given with an agreement with the payee to hold it and present it at a future date does not come within the provisions of the "bad check law," and where defendant testifies to such agreement it is error for the court to direct the jury to find defendant guilty if they believed all the evidence beyond a reasonable doubt.

CRIMINAL ACTION, before *Moore, Special Judge,* at June Term, 1933, of ORANGE.

The evidence was to the effect that on 28 October, 1932, the defendant signed and delivered to an agent of W. I. Anderson Company a check in the sum of $42.86 drawn on the Bank of Chapel Hill. This check represented a payment on a past due account. The check was deposited in Greensboro on 29 October, 1932, and was returned by the Bank of Chapel Hill unpaid. $10.36 had been paid on the check before the issuing of warrant on 7 March, 1933. The defendant testified that he gave the check "to be applied on an account for groceries which had been previously purchased and delivered, and asked him to hold the check until the following Monday and then to deposit it in Greensboro, and that I would deposit enough money in the Bank of Chapel Hill to take care of it before it reached Chapel Hill; that on Tuesday, 1 November, 1932, I did deposit enough money in the Bank of Chapel Hill to take care of this check, but the check had already been returned." The record shows the following: "At this point Judge Moore stopped the testimony and told the attorney for the defendant in the presence of the jury that on defendant's testimony, he would instruct the jury if you believe the evidence beyond a reasonable doubt you will return a verdict that the defendant was guilty." Thereupon the trial judge instructed the jury that if they believed all of the evidence beyond a reasonable doubt they should return a verdict of guilty. A verdict of guilty was returned and from judgment thereon the defendant appealed.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.
L. J. Phipps and Roy W. McGinnis for defendant.

BROGDEN, J. There is no essential difference between a post-dated check and one given with the understanding or agreement that the same shall be held and presented by the owner at a future date. It was the function of the jury to determine whether such agreement was made. If it was made at the time of giving the check, the defendant would not be guilty upon the facts disclosed by the record. See *S. v. Crawford,* 198 N. C., 522, 152 S. E., 504; *S. v. Franklin,* 204 N. C., 157; *S. v. Byrd,* 204 N. C., 162.

New trial.

J. D. PAYNE v. W. W. BROWN ET AL.

(Filed 24 January, 1934.)

1. **Appeal and Error E a—**
   The pleadings, issues and judgment appealed from are necessary parts of the record proper, and where they are not contained in the record the appeal will be dismissed.
2. **Appeal and Error E c—**
   It is the duty of appellant to see that the record is properly made up and transmitted.

APPEAL by plaintiff from *Small, J.,* at June Term, 1933, of ALAMANCE.

John J. Henderson for plaintiff.
Coulter & Allen for defendant Boone.

STACY, C. J. We are not able to determine the nature of this proceeding from the record. But whatever its purpose, it seems that exceptions to a referee's report were heard by Judge Midyette, at May Term, 1932. His rulings were apparently handed to the clerk with the statement that they should go upon the judgment docket "when the defendants have paid $300 into court." Appeal noted.

Later (the time not indicated), this conditional or purported judgment appears to have been stricken out by Cowper, special judge. Presumably, this was done at a term of court held in Alamance County, though the record is silent on the point, and the validity of the order may be doubted. *Wellons v. Lassiter,* 200 N. C., 474, 157 S. E., 434.

At the June Term, 1933, the plaintiff moved for a "rehearing on the referee's report," and further "that there be a rehearing of the referee's report, exceptions filed, and a final judgment upon said hearing." Motion denied and plaintiff appeals.

It would seem that a judgment of some kind should be entered upon the referee's report, and if exceptions were duly and seasonably filed thereto, they should be ruled upon, but the motion seems to be for a "rehearing on the referee's report," whatever this may mean.

The appeal must be dismissed, for the reason that the pleadings and the referee's report have been omitted from the record, and we are not able to ascertain what it is all about. *Parks v. Seagraves,* 203 N. C., 647, 166 S. E., 747. Rule 19, sec. 1, of the Rules of Practice provides that "the pleadings on which the case was tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases." It is the uniform practice to dismiss the appeal for failure to send up necessary parts of the record proper. *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Waters v. Waters, ibid.,* 667, 155 S. E., 564.

It is the duty of appellant to see that the record is properly made up and transmitted. *S. v. Golden,* 203 N. C., 440, 166 S. E., 311; *S. v. Frizell,* 111 N. C., 722, 16 S. E., 409.

Appeal dismissed.

JOHN S. MICHAUX, ADMINISTRATOR OF THE ESTATE OF BAILEY WILLIAMS, DECEASED, EMPLOYEE, AND ANNIE WILLIAMS, v. GATE CITY ORANGE CRUSH BOTTLING COMPANY, EMPLOYER, AND GLOBE INDEMNITY COMPANY, INSURER.

(Filed 24 January, 1934.)

1. Master and Servant F a—

A boy employed by a truck driver for a bottling company with the knowledge and consent of the company, whose services are necessary to the proper distribution of the products of the company is an employee of the company within the meaning of the Workmen's Compensation Act.

2. Master and Servant F b—Evidence held sufficient to support finding that accident arose out of and in course of employment.

A helper of a truck driver, left behind while playing or scuffling with another boy, ran and caught up with the truck, and in attempting to climb upon the moving truck, fell to his injury and death. *Held,* if he was guilty of contributory negligence in attempting to climb upon the moving truck it would not preclude recovery under the provisions of the Compensation Act, and his prior scuffling would not preclude recovery, such acts bearing no relation to the subsequent injury and death.

CIVIL ACTION, before *Sink, J.,* at August Term, 1932, of GUILFORD.

The Gate City Orange Crush Bottling Company owned several trucks which it used to distribute its products. W. S. Simmons drove one of said trucks for the defendant, Bottling Company, and each truck driver was assigned a certain territory. The truck drivers hired boys with the consent and knowledge of the employer to assist in the distribution of the products. The drivers paid the boys so hired by them out of their own wages or commissions. W. S. Simmons, a truck driver, employed the deceased, Bailey Williams, a boy about sixteen years of age as a truck helper and paid him about $4.00 per week. On 26 May, 1929, the truck operated by Simmons stopped to make a delivery of soft drinks and while the truck was standing still, deceased and another Negro boy engaged in a fuss about an Eskimo pie. The driver of the truck started off and ran some little distance when the deceased in this case ran after it, caught the truck, and in attempting to climb on it fell and sustained the injury causing his death. The plaintiff, Annie Williams, mother of the deceased, is the sole dependent of Bailey Williams.

A claim was duly filed with the Industrial Commission and an award made by the hearing Commissioner. Upon appeal to the full Commission the award was affirmed.

The findings of fact of the Industrial Commission are as follows:

1. That all parties are bound by the Workmen's Compensation Act.

2. That Simmons, the driver of the truck, was a regular employee of the defendant, Gate City Orange Crush Bottling Company.

3. That on 26 May, 1929, Bailey Williams, deceased, suffered an accident that arose out of and in the course of his employment.

4. That the mother, Annie Williams, was the sole dependent of the deceased.

Upon appeal to the Superior Court the award of the Industrial Commission was affirmed, and from such judgment the defendants appealed.

Smith, Wharton & Hudgins for plaintiffs.
Kenneth M. Brim for defendants.

BROGDEN, J. The claimant was employed as a truck helper by the driver thereof, with the consent and approval of the employer, Gate

City Orange Crush Bottling Company. Moreover, his services were necessary to the proper and efficient distribution of the products of the employer. He was injured in attempting to climb upon the truck to which he had been assigned in the prosecution of the business of the owner. *Hayes v. Creamery,* 195 N. C., 113, 141 S. E., 340.

Assuming that it was a negligent act for this boy to attempt to mount a moving truck, nevertheless "it is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery." *Chambers v. Oil Co.,* 199 N. C., 28, 153 S. E., 594. The fact that previous to his injury he had been playing or scuffling or sparring with another boy does not preclude recovery upon the facts disclosed by the record. Such acts bore no relation to his fall from the truck and the consequent death.

There was competent evidence to support the findings of fact made by the Industrial Commission and the judgment is

Affirmed.

IN THE MATTER OF J. WAYMAN MITCHELL.

(Filed 24 January, 1934.)

1. **Extradition A d—Fugitive from justice may be arrested on warrant of magistrate of this State, but is entitled to hearing before commitment.**

   Where a justice of the peace of this State issues a warrant for the arrest of a person based upon an affidavit that such person was a fugitive from justice from another state, and the warrant is regular and valid, N. C. Code of 1931, 4556(1), in *habeas corpus* proceedings instituted prior to a hearing upon the warrant before the justice of the peace, an order remanding the petitioner to the custody of the sheriff who had arrested petitioner is not error, but petitioner is entitled to a hearing before the justice of the peace before he is committed to await the issuance of an extradition warrant.

2. **Same—Fugitive from justice arrested on warrant of magistrate of this State may not be delivered to other state prior to proper extradition papers.**

   A person arrested upon a warrant of a justice of the peace of this State, issued upon an affidavit that such person was a fugitive from justice from another state, N. C. Code of 1931, 4556(1), may not be lawfully delivered to the authorities of such other state until the Governor of this State has honored a requisition for such person from the Governor of such other state.

THE above entitled cause was heard on the return to a writ of *certiorari* issued by the Supreme Court on 11 October, 1933, to review the judgment of *Oglesby, J.*, at Concord, N. C., on 6 May, 1933. From CABARRUS. Modified and affirmed.

On 11 November, 1932, J. Wayman Mitchell was arrested in Cabarrus County, North Carolina, by the sheriff of said county under a warrant issued by a justice of the peace of Cabarrus County. The sheriff was commanded by said warrant "forthwith to arrest J. Wayman Mitchell, and him safely keep so that you may have him before me at my office in said county immediately to answer the complaint above set forth, and be dealt with as the law directs." The warrant was issued on an affidavit by which it was made to appear that J. Wayman Mitchell has been indicted by the grand jury of Warren County, in the State of Tennessee, for a felony committed by him in said State, and that he is now in this State as a fugitive from justice.

On 10 December, 1932, before a hearing had been had on the warrant, on the petition of J. Wayman Mitchell, Judge Oglesby, the resident judge of the Superior Court of the Fifteenth Judicial District, issued a writ of *habeas corpus* directed to the sheriff of Cabarrus County, and commanding the said sheriff to have the body of the said J. Wayman Mitchell before him at a time and place fixed in the writ, in order that the lawfulness of his custody and detention by the said sheriff might be inquired into by him.

On the return to the writ of *habeas corpus,* upon his finding that the petitioner was in the lawful custody of the said sheriff, Judge Oglesby ordered and adjudged that the petitioner be and he was remanded to the custody of the sheriff of Cabarrus County. It was further ordered that said sheriff deliver the petitioner, J. Wayman Mitchell, to the authorities of the State of Tennessee, upon their demand.

Thereafter, J. Wayman Mitchell applied to the Supreme Court for a writ of *certiorari* in order that said Court might review the judgment of Judge Oglesby in the *habeas corpus* proceeding pending before him.

Hartsell & Hartsell for petitioner.
Armfield, Sherrin & Barnhardt contra.

CONNOR, J. It appears from the record in this cause, as certified to this Court in response to the writ of *certiorari* issued on 11 October, 1933, that the warrant under which the petitioner, J. Wayman Mitchell was arrested, and under which he was held in custody by the sheriff of Cabarrus County, the respondent in the *habeas corpus* proceeding, was regular and valid in all respects. N. C. Code of 1931, section 4556(1). Chapter 124, sec. 11, Public Laws of N. C., 1931. There was no error in the judgment remanding the petitioner to the custody of the respondent.

It does not appear from the record, however, that the petitioner had been taken by the sheriff before the justice of the peace who issued the warrant, for a hearing as provided by the statute, prior to the issuance of the writ of *habeas corpus.* The petitioner is entitled to a hearing before the justice of the peace, before he can be committed to await the issuance of an extradition warrant by the Governor of this State. At such hearing the justice of the peace will determine whether the petitioner shall be committed to await the issuance of an extradition warrant, or shall be discharged. The petitioner cannot be lawfully delivered to the authorities of the State of Tennessee, until the Governor of this State has honored a requisition from the Governor of the State of Tennessee for the petitioner. It was error to order the sheriff of Cabarrus County to deliver the petitioner to the authorities of the State of Tennessee, upon their demand. As modified in accordance with this opinion, the judgment is

Affirmed.

GEORGE E. PRITCHARD v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CAROLINA BANK AND TRUST COMPANY.

(Filed 24 January, 1934.)

Banks and Banking H a—Claim for deposit may not be offset against statutory liability on stock in insolvent bank.

Plaintiff purchased the claims of depositors in a closed bank and tendered them to the liquidating agent in payment of his stock assessment levied against him upon his stock in the bank. The liquidating agent declined to so apply the claims and plaintiff brought suit. *Held,* claims of depositors cannot be offset against the statutory liability on stock, only dividends on such claims being so applicable, and chapter 344, Public Laws of 1933, has no application, and even if the statute were applicable the result would not be affected, the statute being void. N. C. Code of 1931, sec. 219(a).

APPEAL by plaintiff from *Parker, J.,* at Chambers in Pasquotank County, on 6 July, 1933. From PASQUOTANK. Affirmed.

The Carolina Bank and Trust Company, a corporation engaged in the banking business in Pasquotank County, under the laws of this State, closed its doors and ceased to do business on 23 August, 1929. Its assets are now in the possession of Gurney P. Hood, Commissioner of Banks of North Carolina, and are in process of liquidation as provided by statute. N. C. Code of 1931, sec. 218(c), chap. 113, Public Laws of N. C., 1927, as amended.

The plaintiff is a stockholder of the Carolina Bank and Trust Company, and as such has been assessed by the Commissioner of Banks in the sum of $2,000, by reason of his statutory liability, N. C. Code of 1931, sec. 219(a). This assessment has been duly docketed in the office of the clerk of the Superior Court of Pasquotank County and by virtue of the statute said docketed assessment now has the force and effect of a judgment of the Superior Court. No payment has been made by the plaintiff on said assessment.

Since the Carolina Bank and Trust Company closed its doors and ceased to do business, the plaintiff has purchased from certain of its depositors their claims against said bank, exceeding in amount the said assessment, and relying upon the provisions of chapter 344, Public-Local Laws of North Carolina, 1933, as amended, has tendered said claims to the Commissioner of Banks and demanded that same be applied to the payment and discharge of said assessment. The Commissioner of Banks declined to accept said claims and apply the same in accordance with plaintiff's demand.

At the hearing of the action the court was of opinion that upon the foregoing facts, plaintiff was not entitled to the relief demanded and thereupon adjudged that the action be dismissed and that the defendant recover of the plaintiff the costs of the action.

The plaintiff excepted to the judgment and appealed to the Supreme Court.

Thos. J. Markham for plaintiff.
Thompson & Wilson for defendant.

CONNOR, J. The judgment in this action is affirmed upon the authority of the decision in *In re Trust Company,* 197 N. C., 613, 150 S. E., 118.

Chapter 344, Public-Local Laws of North Carolina, 1933, as amended, has no application to this case. Even if it was applicable, the judgment would be affirmed, for the reason that said statute is unconstitutional and void. See *Edgerton v. Hood, Comr., post,* 816.

Affirmed.

ALICE C. RUSSELL v. L. G. GARNER.

(Filed 24 January, 1934.)

Highways D a—

Evidence of dedication of a road, as widened, and its obstruction by defendant and special injury resulting to plaintiff is sufficient to take the case to the jury in an action for a mandatory injunction and damages for wrongful obstruction.

APPEAL by plaintiff from *Sink, J.,* at February Term, 1933, of FORSYTH.

Civil action for mandatory injunction and for damages.

Plaintiff alleges that the old Styers Mill Road in Forsyth County has been used for ingress, egress and regress to her farm forty years or longer, and that said road was dedicated to the public use many decades ago. This is admitted by the defendant.

It is further alleged, and supported by evidence, that this road was widened in 1925 with the consent of the adjacent landowners. The defendant, L. G. Garner, purchased 4½ acres of land on the east side of this road, as widened, in January, 1928, and has erected a barbed wire fence across a part of the road, forcing traffic to the west side and rendering it practically impassable with heavy trucks at any time, and with other vehicles when the ground is wet or muddy.

At the close of plaintiff's evidence, there was a judgment of nonsuit, from which she appeals.

L. V. Scott for plaintiff.
No counsel appearing for defendant.

STACY, C. J. We are not advised as to the theory upon which the judgment of nonsuit was entered. It would seem to be erroneous under the decisions in *Colvin v. Power Co.,* 199 N. C., 353, 154 S. E., 678, *Grant v. Power Co.,* 196 N. C., 617, 146 S. E., 531, and *Tise v. Whitaker,* 146 N. C., 374, 59 S. E., 1012.

There is evidence (1) of dedication of the road, as widened, (2) of its obstruction by the defendant, and (3) of special injury to the plaintiff. This carries the case to the jury. 13 R. C. L., 231; 29 C. J., 631-632.

Reversed.

AGNES BLACKWELDER v. CITY OF CONCORD.

(Filed 24 January, 1934.)

Municipal Corporations E c—City may not be held liable for error of judgment in adoption of plans for original construction.

Where a city adopts plans of a competent engineer for street improvements which call for graduated drains across each side of one of the streets at a street intersection to accommodate the flow of surface water along the other street, such drainage being necessary in the engineer's opinion because of the contours of the ground at that point, the city may not be held liable in damages by a passenger in an automobile who was violently bumped and severely injured when the automobile in which she was riding passed over the drains at a reasonable rate of speed, there being no evidence of negligent construction or negligent failure to keep the streets in reasonable repair, and the adoption of the original plans for the construction being in the exercise of judgment in the discharge of a governmental function for which the city may not be held liable.

CLARKSON, J., dissenting.

CIVIL ACTION, before *Hill, Special Judge,* at June Term, 1933, of CABARRUS.

At the intersection of Franklin Avenue and Cedar and Pine streets in the city of Concord the said Franklin Avenue runs east and west. Pine Street intersects from the southern side thereof and Cedar Street from the opposite side. Franklin Avenue is a much used street and is paved. Cedar Street is also paved. There is a paved valley gutter on both sides of Franklin Avenue, constructed for the purpose of carrying the water off Franklin across Cedar and Pine streets. The evidence tended to show that this gutter created a depression in the pavement at the intersection of Cedar Street. The depth of the depression was variously estimated from nine to eleven inches, or as a civil engineer who was a witness in the case, said: "There was a rise of approximately one inch to the foot, that is, going out from Franklin Avenue into Cedar Street."

The plaintiff, a passenger in an automobile, was injured on 11 July, 1931. Her narrative of the injury is substantially as follows: "Just before I got hurt we were going toward Franklin Avenue. We went out Pine Street and drove up to Guy Street and backed out in Pine Street, and were going back toward Franklin Avenue. Guy Street is about 300 feet from the intersection of Pine and Franklin Avenue. . . . Mr. Allen was driving. I had no interest or control in the car. I judge we were going at the rate of fifteen or eighteen miles an hour. At this intersection there is a ditch or a gulley, a paved street. These ditches were at the intersection of Cedar Street and Franklin Avenue. It is necessary to cross these ditches. When we went across this gulley it gave me a severe jolt. I never knew what did it. It knocked me unconscious, threw me against the back of the car. . . . We crossed Franklin Avenue, then we went to Guy Street and turned around and came back the same way we had gone. We had crossed Franklin Avenue a few minutes before that and came back across it. We saw the street when we went across, but we didn't think the place was dangerous. . . . Franklin Avenue, Cedar and Pine streets are all paved. I was on the back seat. . . . We were about the center of Franklin Avenue when the car gave a jump, the ridge of the street of Franklin Avenue. This was the second time we went across Franklin Avenue.

. . . Just before you get to the ditch there is a raise in the street on Franklin Avenue. . . . The raise is in Cedar Street. . . ." Another witness for plaintiff said: "There is a trench on each side of Franklin, I guess a water drain, and on the side next to Cedar is almost a sudden jump, looked like 12 or 15 inches jump up, for about 8 or 10 feet. . . . The jump took place along about the side ditch between Cedar and Franklin Avenue, in my opinion. Franklin was raised up in the center like a country road. . . ." Another witness for plaintiff said: "In going out of Franklin Avenue into Cedar Street it is necessary to cross this dip or ditch. There is quite a rise into Cedar Street about 15 or 18 inches deep, quite a sudden rise until you come out of the ditch, and it goes off gradually. . . . I didn't say it was a gulley. There is a kind of a ditch there, so the water will continue to run on down Franklin Avenue instead of out into Cedar Street. . . . All three of the streets are paved. There is no hole. It is what you call a dip to let the water run down from Franklin Avenue."

The evidence for the defendant tended to show that the city of Concord employed Reece I. Long, who was placed in charge of the construction of the streets, and the court further found that such engineer was an expert in civil engineering and road construction work. He testified in effect that in order to care for the drainage at the intersection of Franklin Avenue and Cedar Street, it was necessary to construct a valley at the intersection of Cedar because of the natural drainage and the configuration of earth at that point.

Issues of negligence and damages were submitted to the jury and answered in favor of plaintiff. There was an award of $2,500 in damages, and from judgment upon the verdict the defendant appealed.

H. S. Williams, G. T. Carswell and Joe W. Ervin for plaintiff.
Z. A. Morris and Hartsell & Harsell for defendant.

BROGDEN, J. What duty does the law impose upon municipalities in the construction of paved streets?

The evidence discloses that a side street, known as Cedar Street, intersects a thoroughfare in the city of Concord, known as Franklin Avenue. Several years prior to the injury to the plaintiff the defendant city had undertaken to pave these streets. It employed, so far as the evidence discloses, a competent engineer, who was found by the court to be an expert in street and road construction work. In order to properly drain Franklin Avenue at the intersection of Cedar Street it was necessary to provide for the drainage. The engineer in charge of the work was of the opinion that it was advisable to construct a valley in the pavement at the intersection of Cedar Street for the reason that traffic would be necessarily slowed down in traversing a side street and entering into a thoroughfare. There was no evidence of any defect in the pavement, and while witnesses refer to the drainage valley as a ditch or gulley, they always explain that what they refer to as a ditch or a gulley was a depression or dip in the pavement. It is manifest from an examination of the evidence that any fault in the pavement at the intersection arose out of the original plan of construction and drainage of the area, because all the testimony is to the effect that no change had been made in the streets since the original construction thereof.

Thus it is apparent that the principle of law announced in *Martin v. Greensboro,* 193 N. C., 573, 137 S. E., 666, is applicable to the facts disclosed by the record. This principle was stated as follows: "But in view of the allegations in the complaint, we must furthermore assume that the sidewalks were built and the railway track was laid in pursuance of a plan approved and adopted by the authorities of the city. We are not at liberty to conclude that they acted without deliberation or without due regard to the safety of the public. If they erred, at least the reasonable inference is that their error was one of judgment. It is generally held that a municipal corporation is not liable for injuries to person or property resulting from its adoption of an improper plan when the defects in such plan are due to mere error of this kind. It must follow that the exercise of judgment and discretion in the adoption by the city of a general plan for the improvement of its streets, the building of its sidewalks, and the selection or approval of the space to be occupied by the track of the street railway is not subject to revision by a court or jury in a private action for damages based on the theory that the plan was not wisely or judiciously chosen; although a private action may be maintained for defective construction of the work, or failure to keep it in repair. Herein is the distinction between injuries resulting from the plan of a public improvement made in a city or town and those resulting from the mode of its execution. The adoption of the general plan involves the exercise of judgment; the duty of constructing and maintaining the work done in pursuance of the plan is ministerial. The exercise of discretionary or legislative power is a governmental function, and for injury resulting from the negligent exercise of such power a municipality is exempt from liability."

There are many cases in the books permitting the recovery of damages for negligent construction of streets and for lack of ordinary care in the maintenance thereof, but such cases do not control the decision of the case at bar. The injury in this case results from the plan adopted or the exercise of the judgment of the governing authorities and not from negligence in the execution of the plan in the construction and maintenance of the streets. Therefore, the motion for nonsuit should have been allowed. *Rollins v. Winston-Salem,* 176 N. C., 411, 97 S. E., 211.

Reversed.

CLARKSON, J., dissenting: I think the law as laid down by Judge Hill in the court below applicable to the facts in this action.

"The city does not owe to the public any duties with respect to an insurer; in other words, if a person is injured upon the city streets, it does not make the city liable, if he loses his life upon a public street, the city is not liable, because if it were, then it would insure the lives of the public against accident or injury or loss of life while the public was upon the public highways. There must be more than an injury on a public highway. The injury must have been proximately occasioned by negligence, a negligent default of duty, a failure to exercise reasonable care, that degree of care that a person of ordinary diligence would exercise under the same or similar circumstances and conditions. Now, if in the construction or maintenance of Cedar Street and Franklin Avenue at the point in question you find the municipality failed to do what a reasonably prudent person, acting under the same or similar circumstances and conditions would have done, and you further find that such failure proximately produced and brought about an injury to the plaintiff, then the court charges you that it would be your duty to answer the first issue, yes.

Now, 'proximately caused,' or being the 'proximate cause' of an injury means that the negligence must be the real, efficient, moving cause that brings about and produces the injury and damage complained of; it means the cause without which the injury would not have occurred."

The evidence is thus set forth by the able judge in the court below: "Now she offers evidence tending to show that the streets at that intersection at Franklin Avenue are on a five or six per cent grade, and that where Cedar Street enters into Franklin and where Pine Street enters into Franklin, the municipality has constructed a drain or a ditch line, a valley line, along and across both Pine Street and Cedar Street at these intersections; that the drain line is some 4 to 6 inches in depth.

The plaintiff offers further evidence tending to show that on the Cedar Street side, that is, in the direction of Cedar Street beyond the ditch line some 12 or 18 inches, there is a sudden rise. She offers evidence tending to show that about the time the car driven by Mr. Allen reached this ditch line and the rise, that the rear end went up in the air and caused her the jolt which she alleges she received. Now she says, upon that evidence, that you ought to have no difficulty in finding that there was a defect in the highway, that there was a depression there, that within some few feet of the ditch line there was a hump in the road, a sudden rise, and that the car, traveling about 15 miles an hour, and without any notice or warning to the driver or to her that it would strike that rise, that she was thrown upward and sustained serious physical injuries. She alleges that the city was negligent in permitting that obstruction, depression or defect, as she contends you ought to find it was, to remain in the highway. She contends that a person exercising ordinary care, ordinary diligence, would not have permitted that condition to remain, but would have remedied or removed it; taken steps to do one or the other, removed it or remedied it. She says that, upon the evidence, you ought to answer the first issue, yes."

Walter Furr, a witness for the defendant, a civil engineer, adjudged to be an expert in road construction, testified in part: *"I would not recommend such a valley to cross a main highway. It would be dangerous across any highway."*

This record discloses: "The court, in its discretion, permits the jury to go, in the custody of the sheriff, to view the premises complained of, and the jury, in the custody of the sheriff, did view said premises."

Citing many cases in *Markham v. Improvement Co.,* 201 N. C., 117 (120), is the following: "The law imposes upon the governing authorities of a city or town the duty of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who may have occasion to use them in a proper manner. Such authorities are liable only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect and the occurrence of an injury; he must show that the officers of the city knew, or by ordinary diligence, might have known of the defect. But actual notice is not required. Notice of a dangerous condition in a street may be implied, and indeed will be imputed to the city or town if its officers should have discovered it in the exercise of due care. This principle has been adhered to in our decisions and is now regarded as firmly established."

McQuillin, Municipal Corporations (2d ed.), Volume 7, part sec. 2910, p. 32-35: "The general rule followed by the weight of authority is that the municipality is only required to exercise ordinary or reasonable care, that care (as constantly expressed by early and late judicial utterances, with slight or no deviation) which an ordinarily prudent man would exercise under like circumstances, in maintaining public ways at all times in a reasonably safe condition for travel in the usual modes and for the customary street uses. This is to say that, the duty extends to ordinary care to keep the streets reasonably safe for travel in the customary modes by night as well as by day, and in winter as well as summer."

Babbitt Motor Vehicle Law (4th ed.), sec. 477, pp. 320-321: "The degree of diligence required of a town or city is that of ordinary care; that is to say, a sufficient degree of care to keep the highways reasonably safe and convenient, and to keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes, considering weather conditions, the use and location of the street, etc. Under no circumstances is a city or town held to be an insurer of the safety of its streets for travel, and a city need not make special provisions for safety of automobiles, as a different class of travel from that of ordinary travel by the public. The statutory duty should be pointed out to the jury; it is not enough to base the case on ordinary negligence. In New York it is held that no liability can be predicated upon any defect in the plan of construction of the highway but only upon negligence in the maintenance of the highway as constructed, and although a defect is one of original construction the municipality may not escape liability for negligence in maintaining the highway in such defective condition."

Cyclopedia of Automobile Law, Vol. 3, sec. 12, p. 2167-2168: "The rule prevailing in some jurisdictions, that a municipality will not be liable for defects in a highway or bridge, if such defects inhere in and are a part of a governmental plan adopted by the municipality in the exercise of its governmental powers, is subject to certain exceptions which greatly limit its scope. The execution of the plan or the operation of the improvement are ministerial acts, and, if the plan be executed or the improvement be operated in a negligent manner, the municipality will be liable for the resulting damage. If a plan be defective from the beginning, or if its defect originated shortly after the completion of the improvement, and injury be ultimately the inevitable or probable result, the municipality will be liable for an injury resulting therefrom. In such case, as soon as the fault of the construction is known or ought to be known by the city, it is duty bound to remedy the defect, if this can be done or if not, to close the operation of the improvement until the defect is remedied, and every knowledge is an act of negligence on the part of the municipality.

Under the above rule, while errors of judgment with respect to the plan of construction of a highway are not a proper basis of liability on the part of a municipality, the continued operation and maintenance of the highway under the defective plan, after reasonable notice of the defect and imminence of danger from it, is such a basis, as where a motor truck was injured through the improper covering of a sewer.

The above general rule of nonliability of the municipality is not applicable to plans adopted by some ministerial body, since the city cannot so delegate its governmental powers. Accordingly, if a bridge in a highway is constructed according to plans prepared by ministerial officers of the city in the exercise of a discretion conferred upon them by ordinance, in such manner that the bridge or some part of it is dangerous to travelers without having any lights thereon to indicate its condition, the city fails in its duty to keep the highway reasonably safe for travel, and is guilty of negligence in opening and maintaining such bridge for public travel without such lights thereon."

In *Kiernan v. Mayor of New York,* 43 N. Y. (Supplement), 538 (540-541): "We think, without analyzing or discussing these cases in detail, or attempting to distinguish them, we must hold that it was a question for the jury as to whether the defendant was in this case negligent in failing to maintain a guard or barrier along the easterly edge of this embankment. The city, very likely, could not be held liable merely because the contract did not provide for such guard or barrier; but after the contract was completed, and the work was accepted by the city, it maintained the street without a guard or barrier. The sidewalk ran along the embankment near its edge. The sidewalk was for the use of travelers. And the question whether the street and sidewalk, in that condition, were reasonably safe for public travel, when this unguarded embankment was so close to the sidewalk, was a question of fact for the jury; and, if its condition was not reasonably safe, then the city neglected its duty to the public who had occasion to and did use the sidewalk, and was liable for any injuries caused by such negligence. It cannot be held, as a general proposition, *that a city may excuse itself from a charge of negligence as to the condition and care of its streets merely by claiming that it had acted judicially in determining to leave the street in a dangerous condition for public travel. The cases in which any such rule can be applied at all must necessarily be quite limited, and this clearly is not such a case."* (Italics mine.)

In *Jack v. Town of Greece,* 238 N. Y. (Supplement), 294 (295): "In the trial of this case the court followed the rule laid down in *Kiernan v. City of New York,* 14 App. Div., 156, 43 N. Y. S., 538, cited by *Cardozo, J.,* in *Stern v. International Ry. Co.,* 220 N. Y., 284, 294, 115 N. E., 759, 2 A. L. R., 487, *where it was held that a defect in a highway, although one of original construction, would not excuse the town from a liability for negligence in the maintenance of the highway. The theory of such a ruling is that the courts will not substitute their judgment for that of towns in planning a public improvement, but, when the improvement has been made, they will hold towns to their obligation to keep the improvement, if a highway, in a reasonably safe condition, and thus impose a liability, even though the condition was one of original construction."* (Italics mine.) *Perroth v. Bennett,* 109 Atl. Rep. (Conn.), p. 890.

In the present case it is alleged that the injury was caused by a valley gutter or trench or a dip, located at the intersection of two city streets, and that this gutter or trench was a part of the plan of paving these streets. It was held in *Martin v. Greensboro,* 193 N. C., 573, relied on in the main opinion that it is not negligence for which a municipal corporation may be liable in damages, to build a sidewalk so near a street railway track, or to allow a street railway company to build its track so near a sidewalk, as to leave insufficient space for an automobile (observing the direction to keep to the right) to pass between the sidewalk and a car on the track because the sidewalks were built and the railway track was laid in pursuance of a plan approved and adopted by the authorities of the city. In that case it was not a question of construction but of location. It was pointed out in that case that "it is generally held that a municipal corporation is not liable for injuries to person or property resulting from its adoption of an improper plan when the defects in such plan are due to mere error of this kind." We do not have in the instant case a question of a general plan of location of sidewalks, such as was involved in *Martin v. Greensboro, supra,* but a condition of original construction. It is for the jury to say whether or not the municipality is liable for negligent failure to maintain the highway in a reasonably safe condition, notwithstanding the only defect therein is one of original construction.

If the rule of due care or the prudent man is not applicable to a governing body of a town or city, in reference to building, maintaining and repairing the streets, we open a Pandora box of inefficiency, neglect and danger to the traveling public. With the automobile this principle is all important. The engineer in the present case admits that the street, if so built on a public highway (and a street is a public highway), "it would be dangerous across any highway." This matter is all important to the traveling public. A professor of Highway Engineering at the North Carolina State College, has just compiled statistics and says:

"There were approximately 850 persons killed in motor vehicle accidents in North Carolina during the year 1933. The number of persons reported as injured during the same time is about 5,000, but since so many accidents occur which are not reported, it is estimated that at least 25,000 persons were injured to some extent in North Carolina in traffic accidents during the past year. The cost of the accidents, including property damage and economic loss, is placed at $30,000,000. The total number of deaths for the 6-year period is 4,430, the average per year being 738, and the average increase per year is five per cent."

He gives the accident causes: "The four major causes which contribute to traffic accidents are as follows: (1) Location and defects in streets and highways; (2) Pedestrians in streets and highways; (3) Defects in motor vehicles; (4) Violations of motorists."

He gives as the very first major cause, "location and defects in streets and highways."

The jury heard the evidence, viewed the street. The plaintiff was seriously injured. The issues submitted to the jury and their answer thereto was as follows:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. If so, what damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,500.

I think there was no error in the judgment of the court below, and the matter was properly submitted to the jury.

DEPENDENTS OF THOMPSON v. JOHNSON FUNERAL HOME ET AL.

(Filed 24 January, 1934.)

1. **Master and Servant F a—Evidence held to show that employer regularly employed less than five employees.**

   Where in a hearing before the Industrial Commission the employer testifies that he employed three men other than himself, and another witness testifies that at the time of the injury in suit there were two men working besides the employer and that the other employees were on vacation, the evidence is insufficient to support the finding of the Industrial Commission that the parties were bound by the Compensation Act, since the evidence tends to show that the employer regularly employed less than five employees and the act expressly excludes casual employees, and there being no contention that the parties had elected to be bound by the act in the manner therein prescribed. N. C. Code of 1931, sec. 8081(u), (b).

2. **Master and Servant F i—Where the evidence is insufficient to support jurisdictional finding the award should be vacated or set aside.**

   Where on appeal from an award of the Industrial Commission it appears that the evidence is insufficient to support the finding of the Industrial Commission that the parties were bound by the Compensation Act, the evidence tending to show that defendant employer regularly employed less than five employees, appellant's demurrer to the jurisdiction should be sustained and the award should be vacated or set aside, although appellant did not attack the jurisdiction of the Industrial Commission in the hearing before it, nor will the Supreme Court on appeal remand the cause for further jurisdictional findings, the record disclosing that the question was passed upon by the Industrial Commission, and there being no motion in the Superior Court to remand after the filing of appellant's demurrer.

3. Pleadings D d—

Jurisdiction may not be conferred upon a court or commission by waiver or consent of the parties, and a demurrer to the jurisdiction may be filed at any time.

CLARKSON, J., dissenting.

APPEAL by defendants from *Warlick, J.*, at May Term, 1933, of IREDELL.

Proceeding under Workmen's Compensation Act to determine liability of defendants to dependents or next of kin of J. Fred Thompson, deceased employee.

The hearing commissioner found as a fact, which was later adopted and approved by the full Commission, that "the parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law, and the Sun Indemnity Company is the insurance carrier."

On appeal to the Superior Court, the defendants for the first time challenged the jurisdiction of the Industrial Commission to hear and consider the matter on the ground that the Johnson Funeral Home was not subject to the provisions of the Workmen's Compensation Act, for that, said employer "has regularly in service less than five employees in the same business within this State." N. C. Code of 1931, sec. 8081(u), (b); chap. 120, sec. 14, Public Laws, 1929.

The only evidence in the record bearing upon the point, is the following:

Latta Johnson (employer): "I was present at the Funeral Home on the night of 18 August, and at that time, Fred Thompson and I were on duty.

"Q. How many men did you keep on duty all the time at your place of business?

"A. I have employed three men other than myself, and I try to keep at all times, until a reasonably late hour in the evening, two men on duty to take care of the work."

N. M. Smoot: "I was working at the Funeral Home on the 19th, but there was no one there on the 19th for several days during that period except Mr. Thompson, Mr. Johnson and myself. The other employees were on their vacations."

From a judgment upholding the award of the Commission, the defendants appeal, assigning errors.

Z. V. Turlington and Jack Joyner for plaintiffs.

Cochran & McCleneghan and David J. Craig, Jr., for defendants.

STACY, C. J. It was said in *Dependents of Poole v. Sigman,* 202 N. C., 172, 162 S. E., 198, that if the facts found by the Industrial

Commission are jurisdictional, and there is no evidence tending to support the findings, the award should be set aside and vacated.

We do not find on the record evidence sufficient to support the conclusion that the parties to the present proceeding are subject to the provisions of the Workmen's Compensation Act. Chap. 120, Public Laws, 1929; *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569.

It is provided by section 14 of said act that the same shall not apply to "casual employees, . . . nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, unless such employees and their employer voluntarily elect, in the manner hereinafter specified, to be bound by this act."

The evidence of the employer is, that "I have employed three men other than myself." This is less than five. The testimony of the witness Smoot that "the other employees" (in addition to the deceased and himself who were working with Mr. Johnson at the time) "were on their vacations," does not show that the employer had "regularly in service as many as five employees in the same business within this State," so as to bring the parties, nothing else appearing, under the provisions of the Workmen's Compensation Act. C. S., 8081(k); *Hanks v. Utilities Co.,* 204 N. C., 155, 167 S. E., 560. And it is not contended that they have voluntarily elected to be bound by the act in the manner specified therein. *Southerland v. Harrell,* 204 N. C., 675, 169 S. E., 423.

It would seem, therefore, that the demurrer to the jurisdiction is well taken. *Barham v. Perry, ante,* 428.

In opposition, however, the plaintiffs insist, first, that the evidence is sufficient to support the finding of the Commission, and, second, "but if the court should be of opinion that the record is silent on the jurisdictional question, then the cause should be remanded to the Industrial Commission for a finding on this particular point." *Butts v. Montague Bros.,* 204 N. C., 389, 168 S. E., 215; *Francis v. Wood Turning Co.,* 204 N. C., 701; *Hollowell v. Dept. Con. and Dev.,* 201 N. C., 616. The record is neither sufficient nor silent on the point. It shows that the jurisdictional question was the subject of inquiry before the hearing commissioner and that his finding was approved by the full Commission. Plaintiffs have had their day in court, and they have failed to make out their case. There was no motion in the Superior Court to remand when the jurisdiction of the Industrial Commission was first challenged. *Butts v. Montague Bros., supra.* Nor is the suggestion made here except as a *dernier ressort.* Ordinarily, parties to a suit are allowed but "one bite at the cherry." Having tried and failed, they are not entitled, as a matter of right, to go back and "mend their licks." Furthermore, it seems quite improbable that the plaintiffs would be able to show jurisdiction, even if given another chance, unless the employer, who appears to have qualified as administrator of the employee's estate and is now appealing from the judgment, should change his testimony. There comes a time when litigation should end.

Speaking to a similar situation in *Trust Co. v. Leggett,* 191 N. C., 362, 131 S. E., 752, *Adams, J.,* delivering the opinion of the Court, observed:

"The plaintiff says the question of jurisdiction was not raised in the trial court and should not now be considered; but it has been held that a motion to dismiss for want of jurisdiction may be made for the first time in the Supreme Court. *Tillery v. Benefit Society,* 165 N. C., 262; *McDonald v. MacArthur,* 154 N. C., 122." See, also, *Finley v. Finley,* 201 N. C., 1, 158 S. E., 549; *Power Co. v. Peacock,* 197 N. C., 735, 150 S. E., 510.

Jurisdiction, not given by law, may not be conferred on a court or commission, as such, by waiver or consent of the parties. *Reid v. Reid,* 199 N. C., 740, 155 S. E., 719; *Saunderson v. Saunderson,* 195 N. C., 169, 141 S. E., 572; *Springer v. Shavender,* 118 N. C., 33, 23 S. E., 976, 54 A. S. R., 708, 33 L. R. A., 775; 7 R. C. L., 1039.

Reversed.

CLARKSON, J., dissenting: Under the Workmen's Compensation Act, N. C. Code, 1931 (Michie), section 8081(i), definitions—we find: "When used in this chapter, unless the context otherwise requires—(2) The term 'employment' includes employment by the State and all political subdivisions thereof, and all public and *quasi*-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic service," etc.

Section 8081(u), (b): "This chapter shall not apply to casual employees, farm laborers, Federal Government employees in North Carolina; and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, unless such employees and their employers voluntarily elect, in the manner hereinafter specified, to be bound by this chapter."

This Court, in *Aycock v. Cooper,* 202 N. C., 500 (502-3), has said: "The North Carolina Workmen's Compensation Act, by its express provisions, does not apply to casual employees, farm employees, or Federal Government employees in North Carolina; nor does it apply 'to any person, firm or corporation that has regularly in service less than five employees in the same business within this State, unless such employees and their employer voluntarily elect, in the manner hereinafter specified, to be bound by the act.' N. C. Code of 1931, section 8081(u), (b); Section 14, chapter 120, Public Laws of North Carolina, 1929. In the absence of an election by both employer and employee to be bound by its provisions, the act applies only to employers, who have in their service, in the same business within this State, as many as five employees. In the instant case, there was no evidence tending to show that the employer and his deceased employee had elected to be bound by the provisions of the act. The North Carolina Industrial Commission, therefore, had no jurisdiction of this proceeding for compensation to be paid by the employer to the dependent of his deceased employee, under the provisions of the act, unless the employer had regularly in his employment, at the date of the death of his employee, and in the business in which said employee was employed, as many as five employees."

The testimony of Latta Johnson was, in part: "Q. How *many men* did you keep on duty all the time at your place of business? A. I have employed three men other than myself, and I try to keep at all times, until a reasonably late hour in the evening, two men on duty to take care of the work. Mr. Thompson was on duty on the night of 18 August, and I saw him on that night. . . . I am the sole owner of the Funeral Home, and *I purchased Workmen's Compensation Insurance to cover my liability under the compensation law.* The name of the company I believe was the *Sun Indemnity Company.* I have that policy at my place of business now. *This policy was in force during the months of August and September,* 1932, and, so far as I know, it had not been canceled for any reason by the carrier, and I had not been notified to that effect. . . . Q. And what does that report show as to the date of the alleged injury by accident? A. 18 August, 7:30 in the evening. . . . Q. Why did you put into this record: 'Was in performance of his duties in connection with his work when he mashed his thumb'? . . . A. Because he was attending to his duties."

N. N. Smoot testified, in part: "I was working at the Funeral Home on the 19th, but there was no one there on the 19th for several days during that period except Mr. Thompson, Mr. Johnson and myself. *The other employees were on their vacations.*"

In the statement of the case before the hearing commissioner, Dorsett, is the following: "When this case was called for trial the parties agreed that prior to the death of the deceased he was a regular employee at an average weekly wage of $25.00. The defendants deny liability. *First,* they say that the deceased did not suffer an injury by accident arising out of and in the course of his employment resulting in his death. *Second,* the defendants say that they did not receive notice as promptly as the law provides and that their rights have been prejudiced. *Third,* the defendants say that the deceased did not die as the result of the alleged injury by accident if it should be found that he suffered an injury by accident." The above was the theory upon which the case was tried by defendant before the hearing commissioner.

Upon all the evidence in the record, the commissioner made the following findings of fact: "(1) The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law and the Sun Indemnity Company is the insurance carrier," etc.

Conclusion of law, in part: "The evidence in this record clearly shows that the deceased suffered an injury by accident arising out of and in the course of his employment. The evidence clearly shows that he immediately sought medical attention and that he received competent medical attention, as well as hospitalization. The evidence clearly shows that the employer had knowledge of the accident. The employer actually reported the accident within 30 days from the time it happened. We are unable to see that the rights of the carrier have been in anywise prejudiced." An award was allowed.

The notice of appeal to the full Commission is as follows: "Gentlemen: We wish to acknowledge receipt of formal award in the above matter dated 12 December, 1932, and in accordance with the statute, we wish to give notice of appeal therefrom, on behalf of the Sun Indemnity Company, carrier, and Johnson Funeral Home, the employer, and we do hereby apply for a review of the award by the full Commission. Most respectfully yours, (signed) F. A. McCleneghan."

The judgment on the hearing before the full Commission is as follows: "Upon consideration of all of the evidence and arguments of counsel in this case, the full Commission affirms and adopts as its own the findings of fact, conclusions of law and award of Commissioner Dorsett. Matt H. Allen, chairman."

The notice of appeal to the Superior Court, was as follows: North Carolina, ... County—Before the North Carolina Industrial Commission—Docket No. 3086—I. C. File No. 252418. Notice of appeal: The defendants, Johnson Funeral Home and Sun Indemnity Company, and each of them, hereby give notice of appeal from the award entered in the above entitled matter by the full Commission on 20 February, 1933, said appeal being to the Superior Court of Iredell County. This 16 March, 1933. (Signed) F. A. McCleneghan, atty. for defendants. Certified copy, E. W. Price, secretary."

No language in either of these notices of appeal that any other theory would be relied on except the three before set forth.

The judgment of the Superior Court is as follows: "The above entitled cause coming on to be heard, and being heard upon an appeal by the defendants from the rulings and award made by the Industrial Commission in said cause, before his Honor, Wilson Warlick, judge presiding, and the court being of the opinion that said rulings and award should be affirmed, after considering the record in said cause; and the defendants having challenged the jurisdiction of the Industrial Commission on the ground that the defendants are not bound by the provisions of the North Carolina Workmen's Compensation Act, moved the court that said rulings and award be dismissed, for the reason that said Commission had no jurisdiction of the proceedings, the question of jurisdiction having been first raised upon said appeal, and the court being of the opinion that the said Industrial Commission had jurisdiction of said proceedings. It is therefore, upon motion of Jack Joyner and Z. V. Turlington, attorneys for claimant, ordered, adjudged and decreed, that the award and rulings of the Industrial Commission be, and the same are hereby in all respects, affirmed; the parties having agreed in open court that this judgment could be signed out of court, out of term, and out of district. This 29 July, 1933. Wilson Warlick, judge presiding."

To give jurisdiction (1) there must be in regular service not less than five employees. (2) "Unless such employees and their employers voluntarily elect, in the manner hereinafter specified to be bound by this chapter."

There is no dispute as to the premium being paid to the carrier and the injury taking place during the life of the bond.

The statute omits the manner, but section 8081(www), says: "Every employer who accepts the provisions of this chapter relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized," etc. The evidence shows that this aspect of the statute was complied with. The company issued the insurance and the employer paid the premium. *Kenan v. Motor Co.,* 203 N. C., 108.

It will be noted that neither before the hearing commissioner nor before the full Commission did the carrier raise the question of jurisdiction. The contention of the carrier, and the theory upon which the cause was tried (1) the deceased did not suffer any injury by accident arising out of and in the course of his employment, (2) the carrier did not receive notice promptly as the law provides, (3) that the employee did not die as a result of the injury.

On the evidence, the commissioner found that "The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act and the Sun Indemnity Company is the insurance carrier."

It is well settled that if there is any competent evidence to support the finding of facts by the Industrial Commission, this Court will be bound by them.

Was the above findings of fact—that the parties are bound by the provisions of the act—supported by evidence (1) that there were five employees, (2) the parties elected to be bound? As to the 1st: the evidence of Johnson. He was asked how many *men* he had employed and he said three other than himself, all the time. He was not asked how many women. Smoot said the *other employees were on their vacations.* Johnson said he kept three men all the time and Smoot said the *other employees* were on their vacations. The evidence was sufficient for the Commission to conclude that there were five employed. Also that the parties had elected to be bound by the act as the undisputed facts were that there was insurance in force and the premium paid at the time the injury occurred—undisputed by the carrier. The carrier did not demur to the jurisdiction at the hearing before the hearing commissioner or the full Commission. If it had it would have had to state its reason and the facts could have been developed more fully; but the carrier lulled the plaintiff to sleep by stating other grounds of defense. The point was for the first time made in the Superior Court.

C. S., 512, is as follows: "The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein." In *Elam v. Barnes,* 110 N. C., p. 73, the facts were similar, it is said at p. 74: "It is but fair, however, to the opposite side that the court below should require, as the statute demands, that the demurrer, even when made *ore tenus,* should point out the alleged defect, since it gives opportunity to ask for an amendment if the defect admits of cure, or permits further costs to be avoided if the defect is incurable, since the party, upon the particulars being indicated, may become satisfied of the invalidity of his cause of action and discontinue further proceedings. This would seem to be the reason of the statute, at any rate its provisions are clear and should be observed." *Seawell v. Cole,* 194 N. C., 546.

The Industrial Commission alone finds the facts and by analogy to the above decision I think that this action should not now be dismissed under the circumstances, but if the evidence is not sufficient, which I think it is, it should be remanded for further findings of fact on this aspect. When the Superior Court affirmed the findings of fact of the Industrial Commission, and defendant appealed therefrom, how could plaintiff request that the case should then be remanded, when the court thought the evidence sufficient? The case was tried on one theory before the hearing commissioner and the full Commission, and that theory changed in the Superior Court and this Court. I think the defendant is estopped by the theory on which the case was tried, to the extent that it is bound by the findings of facts before the Industrial Commission.

As I understand it, the plaintiffs may make a motion in the court below to remand the cause to the Industrial Commission, when the Commission can hear other facts and if the Johnson Funeral Home, the defendant, has five or more employees the Industrial Commission would have jurisdiction.

CHARLES E. KISTLER ET AL. v. THE CALDWELL COTTON MILLS COMPANY.

(Filed 24 January, 1934.)

1. **Corporations K a—Holders of one-fifth of total capital stock may sue for dissolution for failure to earn dividends for three years.**

Where a corporation has failed to earn four per cent on its total paid-in capital stock, it is not required that stockholders suing for its dissolution under C. S., 1186, should own one-fifth of its common stock in order to maintain the action, it being sufficient if they own common and preferred stock constituting one-fifth or more of the total paid-in capital stock of the corporation, common and preferred, and that they have owned such stock for a period of two years next preceding the institution of the action, and their right to maintain the action is not affected by the fact that holders of preferred stock are given no vote in the management of the corporation, the preferred stock being a part of the capital stock of the corporation, C. S., 1156, entitling the holders to all rights of stockholders subject to the terms and conditions on which their stock was issued.

2. **Corporations K b—Whether earned dividends are sufficient to resist dissolution will be determined in relation to total capital stock.**

The fact that a corporation has earned net income sufficient to pay in good faith dividends on its preferred stock within three years prior to the institution of an action for its dissolution under C. S., 1186, is not sufficient to resist the action for dissolution if the earned dividends do not amount to four per cent on its total capital stock, preferred and common.

3. **Constitutional Law E a—**

The constitutionality of C. S., 1186, providing for the dissolution of corporations in certain instances, cannot be successfully assailed in an action thereunder to dissolve a corporation organized subsequent to its enactment.

4. **Corporations K b—Where petition meets all requirements of C. S., 1186, it is not error for court to order corporation to file inventories.**

Where the petition in an action for the dissolution of a corporation meets all requirements of C. S., 1186, it is not error for the court to require the defendant corporation to file inventories as provided by statute, and whether the court will order dissolution upon the final hearing is to be determined in its discretion according to whether, from all the facts shown, the failure of the corporation to earn the required dividends was due to temporary conditions or to its management.

CLARKSON, J., dissenting.

APPEAL by defendant from *Finley, J.,* at Chambers, in Morganton, N. C., on 22 June, 1933. From CALDWELL. Affirmed.

This is an action for the dissolution of the defendant corporation, and for the distribution of its net assets among its stockholders, in accordance with their respective rights and equities.

The action was begun in the Superior Court of Caldwell County on 1 June, 1933. It was heard by the judge holding the courts of the judicial district in which Caldwell County is situate, at chambers, (1) on the demurrer of the defendant to the complaint; and (2) on the motion of the plaintiffs for an order requiring the defendant to file inventories as provided by C. S., 1186.

The demurrer of the defendant was overruled, and the motion of the plaintiff was allowed. The defendant appealed to the Supreme Court.

Mull & Patton, S. J. Ervin and S. J. Ervin, Jr., for plaintiffs.
Mark Squires, Newland & Townsend and L. H. Wall for defendant.

CONNOR, J. This action was instituted under the provisions of C. S., 1186, which is as follows:

"C. S., 1186. When stockholders owning one-fifth or more in amount of the paid-up stock of any corporation organized under the laws of and doing business in this State, except corporations organized for religious, charitable, fraternal, and educational purposes, and except banking and public-service corporations, apply in term or vacation to the judge of the Superior Court holding the courts for the county in which the principal place of business of the corporation is situated, by petition containing a statement that for three years next preceding the filing of the petition, which time shall begin to run from three years after it has begun business, the net earnings of the corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation, over and above the salaries and expenses authorized by its by-laws and regulations, or that the corporation has paid no dividend for six years preceding said application; or whenever stockholders owning one-tenth or more in amount of the paid-up common stock of any such corporation apply to the judge of the Superior Court as aforesaid by petition containing a statement that the corporation has paid no dividend on the common stock for ten years preceding said application, and that they desire a dissolution of the corporation, the judge shall make an order requiring the officers of the corporation to file in court, within a reasonable time, inventories showing all the real and personal estate of the corporation, a true account of its capital stock, the names of the stockholders, their residences, the number of shares belonging to each, the amount paid in upon said shares and the amount still due thereon, and a statement of all encumbrances on the property of the corporation, and all its contracts which have not been fully satisfied and canceled, specifying the place and residence of each creditor, the sum owing to each, the nature of the debt or demand, and the consideration therefor, and the books and papers of the corporation. Upon the filing of the inventories, accounts and statements, the court shall enter an order requiring all persons interested in the corporation to appear before a referee to be appointed by the court, at a time and place named in the order, service of which may be made by publication for such time as may be deemed proper by the court, and show cause why the corporation should not be dissolved. If it appears to the court that the statements contained in the petition are true, the court may adjudge a dissolution of the corporation and shall appoint one or more receivers, who shall have all powers of receivers conferred by this chapter for the winding up the affairs and distribution of the assets of the corporation. If it appears to the court that the corporation is insolvent or in imminent danger of insolvency, the court may appoint a temporary receiver of the corporation pending dissolution. No suit shall be brought for the dissolution of a corporation under the provisions of this section until each and all of the petitioners have owned their stock for the term of two years prior to the institution of the action; nor shall any suit be brought for the period of three years after a final judgment upon a prior petition as herein provided."

The defendant in this action, the Caldwell Cotton Mills Company, is a corporation organized under the laws of this State. The said corporation is now, and has been continuously since its organization in 1923, engaged in the business of operating a cotton mill, and of manufacturing cotton goods, in the town of Lenoir, Caldwell County, North Carolina. It has a paid-up capital stock of $349,500, divided into 2,495 shares of common stock, and 1,000 shares of preferred stock, each of the par value of $100.00. The holders of its preferred stock are entitled to receive, when and as the same are declared from the surplus or net profits of said corporation, dividends at the rate of seven per cent per annum, payable quarterly on the first days of February, May, August and November of each and every year. The dividends on its preferred stock are cumulative, and are payable before any dividends are payable on its common stock. Upon the dissolution of said corporation, whether voluntary or involuntary, and the liquidation of its assets, the holders of its preferred stock are entitled to be paid in full the par value of their stock, together with amounts due as dividends, before any amount shall be paid out of the assets of the corporation to the holders of its common stock. The holders of preferred stock of said corporation are not entitled to voting powers or privileges.

The plaintiffs are now and have been for more than two years prior to the commencement of this action owners and holders of 200 shares of the common, and of 690 shares of the preferred stock of said corporation. For a period of three years next preceding the commencement of this action, the net earnings of the defendant corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon its paid-up capital stock. No action has heretofore been brought under the provisions of C. S., 1186, for the dissolution of said corporation. Dividends have been paid regularly on the preferred stock of said corporation from the date of its organization until 1 February, 1932. No dividend has been paid on said stock since said date.

The plaintiffs are now and have been for more than two years prior to the commencement of this action, the owners and holders of more than one-fifth of the paid-up capital stock of the defendant corporation. They own 200 shares of the common, and 690 shares of the preferred stock of said corporation. The total number of shares of said capital stock, both common and preferred, is 3,495. The contention of the defendant that plaintiffs cannot maintain this action under the provisions of C. S., 1186, because they do not own as much as one-fifth of the common stock of the defendant cannot be sustained. No distinction is made in the statute between holders of the common and holders of the preferred stock of a corporation, when its dissolution is sought under the provisions of the statute, on the ground that the net earnings of the corporation for a period of three years next preceding the commencement of the action for that purpose have not been sufficient to pay in good faith an annual dividend of four per cent upon the paid-up capital stock of the corporation. In such case, it is immaterial that the net earnings of the corporation for the said period have been sufficient to pay dividends on its preferred stock, and that such dividends have been paid, unless the total amount of such dividends equals four per cent per annum of the total capital stock, both common and preferred, of the corporation. It is also immaterial that the holders of the preferred stock have no voting powers or privileges, as in the instant case. The statute cannot and ought not to be so construed as to deprive preferred stockholders of a corporation organized under the laws of and doing business in this State, of its protection, when such corporation for any reason, under the management of officers and directors, who were elected or appointed by the holders of its common stock, for a period of three successive years, has failed to earn a profit sufficient for the payment of a dividend of at least four per cent per annum on its total paid-up capital stock. The language of the statute does not justify such construction. The holders of preferred stock of a corporation are not creditors and have no rights as such. *Power Co. v. Mill Co.,* 154 N. C., 76, 69 S. E., 747. They are, however, stockholders of the corporation, and subject to the terms and conditions on which their stock was issued, have all the rights of stockholders, 14 C. J., 416. The preferred stock forms a part of the capital stock of the corporation. C. S., 1156.

The further contention of the defendant that C. S., 1186, is void because its enactment by the General Assembly was in violation of provisions of the Constitution of the United States and of the State of North Carolina, is likewise untenable. The validity of the statute has been recognized by this Court in *Lasley v. Mercantile Co.,* 179 N. C., 575, 103 S. E., 213, and in *Winstead v. Hearne,* 173 N. C., 606, 92 S. E., 613. The statute was enacted by the General Assembly of this State in 1913, and was amended in 1915. It was in force at the date of the organization of the defendant corporation, and of the creation of its capital stock.

There was no error in the refusal of the judge to sustain the defendant's demurrer to the complaint.

Nor is there error in the order requiring the defendant to file inventories as provided by C. S., 1186. When the inventories have been filed and the referee, to be appointed by the court, has filed his report, the judge may in his sound judicial discretion, order a dissolution of the defendant corporation, and the distribution of its net assets among its stockholders, in accordance with their respective rights and equities, as provided by the statute. If it shall appear to the judge from all the facts shown by the record at the final hearing that the failure of the defendant corporation to earn a sufficient profit for the payment of an annual dividend on its paid-up capital stock of four per cent, during the past three years, was due to temporary business conditions, and not to the management of its affairs by its officers and directors, and that such failure does not justify a reasonable apprehension that the corporation is in danger of becoming insolvent, the judge may, in the exercise of his discretion, and doubtless will, decline to adjudge the dissolution of the corporation.

The orders overruling the defendant's demurrer to the complaint and requiring the defendant to file the inventories as provided by C. S., 1186, are

Affirmed.

CLARKSON, J., dissenting: This is an action for the dissolution of the defendant corporation, and for the distribution of its net assets among its stockholders, brought by certain owners of preferred and common stock. It is well settled that the right to exist as a corporation is derived from the State and that in the absence of statutory provision to the contrary, only the State which created the corporation can sue to dissolve it. Fletcher, Cyclopedia of the Law of Private Corporations (per. ed.), Vol. 16, sec. 8077, p. 858; *Bass v. Navigation Co.,* 111 N. C., 439; *Torrence v. Charlotte,* 163 N. C., 562. See *Lesley v. Mercantile Co.,* 179 N. C., 575; *S. c.,* 578; C. S., 1182, *et seq.* The Legislature has power to provide, by statute, for the dissolution of a corporation at the suit of an individual, and this action was instituted under the provisions of C. S., 1186.

It may be stated that equity, independently of statute, has no jurisdiction to decree the dissolution of a corporation. The only jurisdiction that a court can have to decree a dissolution, as in the instant case, must be derived from the statute under which the action for dissolution was brought. The pertinent provisions specified in the present statute require that stockholders must (a) own one-fifth or more in paid-up stock, and (b) these stockholders must show that for three years next preceding the filing of the petition the net earnings of the corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation. It is alleged that the plaintiffs in the present action are now, and have been for more than two years prior to the commencement of the present action, owners of 200 shares of the common, and 690 shares of the preferred stock of said corporation. For three years next preceding the commencement of this action, the net earnings of the defendant corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon its paid-up common capital stock, *but dividends of seven per cent have been paid regularly on the preferred stock of said corporation from the date of its organization until 1 February, 1932.*

The defendant, the Caldwell Cotton Mills Company, had paid-up capital stock of $349,500, divided into 2,495 shares of common stock, and 1,000 shares of preferred stock, making a total of 3,495 shares, each of the par value of $100.00. Unless, under the statute, the holders of preferred stock are entitled to join with holders of common stock, the plaintiffs have no right to bring this action for dissolution of the corporation, for they do not hold one-fifth of the common stock. It is their contention that they have a right not only to tack their preferred stock onto their common stock but also to pool dividends on the preferred stock with failure to pay dividends on common stock, so as to bring their action within the requirements of the statute that "the net earnings of the corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation."

The holders of the preferred stock, under the provisions of their contract with said corporation, as set forth in the certificate of preferred stock, are entitled to receive when as declared from the surplus or net profits of the company, dividends at the rate of seven per centum per annum, payable quarterly on the first days of February, May, August and November of each and every year, and the dividends on the preferred stock are cumulative, and are payable before any dividends on the common stock. Upon dissolution of the corporation, the holders of the preferred stock are entitled to be paid in full both the amount of their shares and the unpaid dividends accrued thereon, before any amount shall be paid to the holders of the common stock. The holders of the preferred stock are not entitled to voting powers or privileges.

It is alleged in the complaint: "That the contract between said corporation and the owners and holders of preferred stock therein as set forth in the certificate of preferred stock created and issued by the defendant is, in part, as follows: . . . The holders of the preferred *stock of this company shall not be entitled to voting powers or privileges."* (Italics mine.) For the purpose of a demurrer, the above facts are admitted. The holders of preferred stock of a corporation are not creditors. *Power Co. v. Mill Co.,* 154 N. C., 76; *Cotton Mills v. Bank,* 185 N. C., 7; *Ellington v. Supply Co.,* 196 N. C., 784.

The difference between preferred stockholders and common stockholders is that the former are entitled to a certain preference—in the instant case to seven per cent cumulative dividends payable before any dividends on the common stock. This is a square-cut distinction between the two classes of stockholders, as long as the dividends on the preferred stock continue to be paid, for it is provided that the preferred stockholders have no voting powers or privileges. Even if the dividends are not paid, they are cumulative, and the preferred stockholder is still in a different class from the common stockholders, not only because of a lack of voting power but also because of still having a preferred claim over common stockholders for unpaid dividends.

While it is apparent that there may be conflicting interests between the holders of preferred stock and the holders of common stock, under the conditions and circumstances of the instant case, the preferred stockholders being interested in the continuance of the payment of their dividends while the common stockholders may be getting nothing, the statute provides the holders of common stock a remedy. One-fifth of the holders of the common stock may bring an action for dissolution. That this was the intention of the Legislature is indicated by the fact that a subsequent amendment (Public Laws, 1915, chap. 137) to the original statute (Public Laws, 1913, chap. 147) provides for the insertion of a phrase "or whenever stockholders owning one-tenth or more in amount of the paid-up *common* stock of such corporation," etc. It was the understanding of the 1915 Legislature that such was the intention of the 1913 Legislature.

This action was instituted under C. S., 1186. The contract under which the holders of preferred stock bought their stock from the corporation specifically provided that they were to have no voting powers or privileges. Their remedy for failure to pay dividends would not arise under this statute, but even if they were entitled to bring such an action they cannot qualify under its provisions, for they have received dividends within three years. "Defendant since its organization has paid dividends on its preferred stock according to the amount mentioned therein from the date of its issuance up to and including the dividend installment falling due 1 February, 1932, after which time it has paid no dividend on said preferred stock. This stipulation may be considered by the court on the motion to dismiss. This stipulation is not to be considered as an admission that the defendant earned any money wherewith to pay said dividends."

It cannot be said that the interests of the two classes of stockholders may be merged by pooling the two classes of stock, for their interests are not the same. The holders of preferred stock are concerned with a continuance of their preferred dividends of seven per cent, the interest of the holders of common stock in conserving the assets of the corporation with a view to increased dividends later. The holders of the common stock own the assets of the corporation after the holders of the preferred stock are paid.

Under the terms of the contract contained in the certificate of preferred stock, and under the provisions of C. S., 1186, the demurrer of the defendant should have been sustained, and the action of the lower court should be reversed.

J. H. EDGERTON AND MRS. S. R. MORGAN AND G. E. MORGAN, v. GURNEY P. HOOD, COMMISSIONER OF BANKS EX REL. RUTHERFORD COUNTY BANK AND TRUST COMPANY.

(Filed 24 January, 1934.)

Banks and Banking H d—Act allowing purchased claims for deposits to be used at face value to pay debts to certain closed banks held void.

Chapter 344, Public-Local Laws of 1933 as amended by chapters 540 and 541, Public Laws of 1933, providing that depositors of certain closed banks might sell their claims for deposits to persons indebted to the banks at the date of their closing, and that the liquidating agents of such banks should accept such purchased claims at their face value in payment of the purchasers' debts to the banks, *is held* unconstitutional and void, it being in violation of Art. I, sec. 7, which prohibits exclusive and separate emoluments or privileges except for public service, in that the act allows only creditors who were depositors to sell their claims only to debtors of the banks at the date of their closing in discrimination against other debtors and creditors of the banks, and in that it applies only to banks within certain designated counties, and in some instances only to towns and townships in the designated counties, in discrimination against debtors and creditors of closed banks in other sections of the State, and in that it applies only to banks within the designated areas which had been closed for eighteen months prior to the ratification of the act in discrimination against debtors and creditors of banks in such areas which closed subsequent to the specified time, all of which classifications are unjust and arbitrary.

STACY, C. J., concurs in result.

APPEAL by defendant from *Schenck, J.*, at September Term, 1933, of RUTHERFORD. Reversed.

This is an action instituted under the provisions of chapter 102, Public Laws of North Carolina, 1931, to determine the rights and duties of the parties under the provisions of chapter 344, Public-Local Laws of North Carolina, 1933, as amended by chapters 540 and 541, Public Laws of North Carolina, 1933, and for judgment in accordance with such rights and duties.

The action was tried on a statement of facts agreed which are substantially as follows:

1. The Rutherford Bank and Trust Company, a corporation engaged in the banking business under the laws of this State, in Rutherford County, closed its doors and ceased to do business on 4 February, 1930. Its assets are now in the possession of the Commissioner of Banks of North Carolina, and are in process of liquidation for the payment of its liabilities as provided by statute. N. C. Code of 1931, sec. 218(c), chap. 113, Public Laws of N. C., 1927, as amended. The claims of its depositors and other creditors have not been paid in full. The assets now in the possession of the Commissioner of Banks are not sufficient in value to fully pay and discharge said claims.

2. All the preferred claims of creditors of the Rutherford County Bank and Trust Company have been paid and fully discharged by the Commissioner of Banks, out of the assets of said bank. No payments have been made on claims of depositors and other creditors of said bank, who are not entitled to preferences. These claims as filed with the Commissioner of Banks amount to $568,203.18, of which claims amounting

to $109,785.44 are for notes and accounts due by said bank, at the date of its closing, and claims amounting to $458,417.74, are for deposits in said bank, at said date.

3. At the date of the closing of the Rutherford County Bank and Trust Company, Mrs. S. R. Morgan, one of the plaintiffs in this action, had on deposit with the said bank the sum of $310.26, and J. H. Edgerton, another plaintiff, had on deposit with said bank the sum of $473.51, both said deposits making a total of $783.77, due by said bank to said plaintiffs, as depositors. Claims for said deposits have been duly filed and allowed by the Commissioner of Banks. Both these claims have been sold and assigned for value by the said plaintiffs, since the closing of said bank, to the plaintiff, G. E. Morgan, who by virtue of said purchase and assignments is now the owner of both said claims.

4. At the date of the closing of the Rutherford County Bank and Trust Company, the plaintiff, G. E. Morgan, was indebted to said bank in the sum of $600.00, and accrued interest, as evidenced by his promissory note payable to said bank. This note has not been paid, and is now held by the Commissioner of Banks as an asset of the Rutherford County Bank and Trust Company.

5. The plaintiff, G. E. Morgan, has tendered to the defendant, Commissioner of Banks, in payment and discharge of his note for $600.00, and accrued interest, now held by the said Commissioner as an asset of the said bank, the claims against the Rutherford County Bank and Trust Company, aggregating the sum of $783.77, which were sold and assigned to said plaintiff, since the closing of said bank, by the plaintiffs, Mrs. S. R. Morgan and J. H. Edgerton, and has demanded that the said Commissioner of Banks accept said claims and apply the amount due thereon in discharge of his said note and accrued interest, as provided by chapter 344, Public-Local Laws of North Carolina, 1933, as amended by chapters 540 and 541, Public Laws of North Carolina, 1933. The defendant, Commissioner of Banks has refused and still refuses to accept said claims, and to apply the amount due thereon as demanded by the plaintiffs, for the reason that he has been advised that the statute, under which said demand was made, is unconstitutional and void.

The court was of opinion that by virtue of the provisions of chapter 344, Public-Local Laws of North Carolina, 1933, as amended by chapters 540 and 541, Public Laws of North Carolina, 1933, the plaintiff, G. E. Morgan, has the right to have the claims sold and assigned to him by his coplaintiffs, Mrs. S. R. Morgan and J. H. Edgerton, applied to the payment and discharge of his note and accrued interest, and that it is the duty of the defendant, Commissioner of Banks, to accept said claims, and apply the amount due thereon to the payment and discharge of said note and accrued interest.

In accordance with said opinion, it was ordered and adjudged by the court that the defendant, Commissioner of Banks, accept from the plaintiff, G. E. Morgan, the said claims, and apply the amount due thereon, to the payment and discharge of said note and accrued interest, and that the plaintiffs recover of the defendant the costs of the action. The defendant excepted to the judgment and appealed to the Supreme Court.

Edwards & Edwards, Stover P. Dunagan and Quinn, Hamrick & Hamrick for plaintiffs.
B. T. Jones, Jr., for defendant.

CONNOR, J. This action was instituted in the Superior Court of Rutherford County under the provisions of chapter 102, Public Laws of North Carolina, 1931 (N. C. Code of 1931, sec. 628), which is entitled, "An act to authorize declaratory judgments." The purpose of the action is to have the rights of the plaintiffs and the duties of the defendant, with respect to the administration of the assets of the Rutherford County Bank and Trust Company, under the provisions of chapter 344, Public-Local Laws of North Carolina, 1933, as amended by chapters 540 and 541, Public Laws of North Carolina, 1933, determined by the court, to the end that a judgment may be rendered in the action to enforce such rights and to compel the performance of such duties. It is conceded that on the facts agreed, the plaintiffs are entitled to the relief provided by the statute, and demanded by them, and that it is the duty of the defendant to comply with the provisions of the statute, unless, as contended by the defendant, the statute is void because its enactment by the General Assembly was in violation of certain provisions of the Constitution of North Carolina and of the United States. The sole question, therefore, presented by this appeal is whether chapter 344, Public-Local Laws of North Carolina, 1933, as amended by chapters 540 and 541, Public Laws of North Carolina, 1933, is unconstitutional and for that reason void. The statute now reads as follows:

"*The General Assembly of North Carolina do enact:*

Section 1. That any person, firm or corporation, society or organization, by whatsoever name designated, having any moneys or funds on deposit in any bank in Buncombe, Cherokee, Craven, Halifax, Haywood, Henderson, Jackson, Johnston, Macon, Robeson, Rutherford, Sampson, Stanly, Wilson, Transylvania, Alexander, Avery, Beaufort, Bertie, Bladen, Camden, Carteret, Catawba, Chatham, Chowan, Cleveland, Duplin, Edgecombe and all municipalities therein, with the exception of the town of Pine Tops, Gaston, Gates, Hertford, Hoke, Jones, Lee, Lenoir, Lincoln, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Pamlico, Pasquotank, Perquimans, Pitt, Polk, Richmond, Rockingham, Scotland, Stokes, Tyrrell, Wayne, Wilkes counties, North Carolina, that is now closed, and has been closed eighteen months or longer prior to the ratification of this act, and which has not paid its depositors and other creditors in full, shall, from and after the ratification of this act, have authority to sell and convey such accounts or deposits to any person, firm or corporation that may desire to purchase the same, and who owe such closed bank any money, and such person, firm or corporation purchasing such account or deposit shall be entitled to apply such account or deposit to the discharge of any debts owing by them to such closed bank at the full face value of such account or deposit.

Section 2. That this act shall not apply to any closed bank or banks, in Robeson County, if after thirty days' notice by publication, 49 per cent or more of the depositors of such closed bank protest in writing to the Commissioner of Banks. The State Commissioner of Banks is hereby directed to publish due notice to depositors in closed banks in Robeson County for a period of at least thirty days, said notice to begin within twenty days after the ratification of this act. After the said thirty days notice, and before the full provisions of this act shall become effective as to such bank or banks in Robeson County, the Commissioner of Banks shall publish a complete list of all depositors together with a list of the names of all depositors protesting under the previous notice. The Commissioner of Banks is hereby authorized to take such further steps as are necessary, in his discretion, to carry out the main purpose of this section; *provided,* this section shall apply only to banks in Maxton Township, Robeson County, North Carolina.

Section 3. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

Section 4. That this act shall be in full force and effect from and after its ratification."

The original act was ratified on 18 April, 1933. The acts amending the original act were ratified on 15 May, 1933. This action was begun on 22 August, 1933.

A reading of the statute discloses that its provisions apply only to creditors of a bank to which the statute is applicable, whose claims are founded upon deposits in the bank at the date of its closing; these provisions do not apply to other creditors whose claims may be for supplies or fixtures sold, or for services rendered, or for money loaned to the bank prior to its closing. Only creditors of the bank who were depositors are authorized by the statute to sell and convey their claims to persons, firms or corporations who may desire to purchase such claims; such claims may be sold and conveyed, under the provisions of the statute, only to purchasers who were indebted to the bank at the date of its closing. The statute thus not only attempts to confer a privilege on one class of the creditors of a closed bank, but discriminates against another class. No just or reasonable ground for this classification of the creditors of a closed bank to which the statute is applicable appears upon the face of the statute, or is suggested by the record in this appeal. The classification is unreasonable and arbitrary, and cannot be justified or sustained.

The statute does not apply to all banks in this State that were closed and had been closed for more than eighteen months prior to its ratification. It applies only to such banks in certain counties designated in the statute, and in some cases only to banks in towns or townships in said counties. The statute thus not only attempts to confer a privilege on the creditors and debtors of certain banks in the State, but discriminates against creditors and debtors of all closed banks in the State to which it is not applicable. No just or reasonable ground for this classification of closed banks in this State appears upon the face of the statute, or is suggested by the record in this appeal. The classification is unreasonable and arbitrary, and cannot be justified or sustained.

The statute does not apply to all closed banks in the towns, townships or counties designated therein; it applies only to such banks as have been closed for more than eighteen months prior to the ratification of the statute. Creditors and debtors of a closed bank that has been closed for less than eighteen months prior to the ratification of the statute, although such bank is located in one of the counties designated in the statute, are denied the privilege conferred by the statute upon creditors and debtors of a closed bank to which the statute is applicable. No just or reasonable ground for this classification appears upon the face of the statute or is suggested by the record in this appeal. The classification is unreasonable and arbitrary and cannot be justified or sustained.

Without regard to the question as to whether the statute contravenes section 29 of Article II of the Constitution of North Carolina, or section 10 of Article I of the Constitution of the United States, as contended by the defendant on this appeal, it is clearly in contravention of section 7 of Article I of the Constitution of North Carolina, and for that reason is unconstitutional and void. The plaintiffs have no rights under the statute, which it is the duty of the defendant to recognize or enforce.

Section 7 of Article I of the Constitution of North Carolina is as follows:

"No man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."

The statute contravenes this sound and just principle, and violates both the letter and spirit of the provision, because (1) it attempts to confer an exclusive and separate privilege on one class of creditors and debtors of a closed bank, which it denies to another class, with no just or reasonable ground for the classification; (2) it attempts to confer an exclusive and separate privilege on the creditors and debtors of one class of closed banks in this State, which it denies to the creditors and debtors of another class, with no just or reasonable ground for the classification; and (3) it attempts to confer an exclusive and separate privilege on the creditors and debtors of one class of closed banks in the counties, townships and towns designated in the statute, which it denies to the creditors and debtors of another class, with no just or reasonable ground for the classification.

Statutes enacted by the General Assembly in violation of section 7 of Article I of the Constitution of this State have been declared unconstitutional and void by this Court in *Plott v. Ferguson,* 202 N. C., 446, 163 S. E., 688; *S. v. Fowler,* 193 N. C., 290, 136 S. E., 709; *Motley v. Warehouse Co.,* 122 N. C., 347, 30 S. E., 3; *Simonton v. Lanier,* 71 N. C., 498.

The question as to whether a statute enacted by the General Assembly of this State, applicable to all creditors and all debtors of all closed banks in the State, providing that any creditor of such bank shall be authorized to sell and convey his claim against such bank to a purchaser who is indebted to said bank, and that such purchaser shall be entitled to apply such claim to the discharge of his debt to the bank at its full face value, would contravene section 10 of Article I of the Constitution of the United States, prohibiting any state from passing a law impairing the obligation of a contract, or making anything but gold and silver coin a tender in payment of debts, is not considered or decided on this appeal. For the reason stated in this opinion the judgment of the Superior Court is

Reversed.

STACY, C. J., concurs in result.

IN RE CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, N. C.

(Filed 24 January, 1934.)

Banks and Banking H d—

Act allowing purchased claims for deposits to be used at face value to pay debts to certain closed banks is held unconstitutional and void.

APPEAL by respondent, Gurney P. Hood, Commissioner of Banks, and others from *Alley, J.,* at May Term, 1933, of BUNCOMBE. Affirmed.

The Central Bank and Trust Company, a banking corporation engaged in the banking business at Asheville, N. C., under the laws of this State, closed its doors and ceased to do business on 19 November, 1930. Its assets are now in the possession of the Commissioner of Banks of North Carolina, for liquidation as provided by statute, N. C. Code of 1931, sec. 218(c); chapter 113, Public Laws of N. C., 1927, as amended.

The above entitled cause was heard on a petition filed by certain creditors of said bank, whose claims have been adjudged as entitled to preferential payment, for an order directing the Commissioner of Banks to decline to allow certain debtors of said bank to pay and discharge their debts by claims purchased by them from certain creditors of said bank, under the provisions of chapter 344, Public-Local Laws of North Carolina, 1933, as amended.

At the hearing the court was of opinion that said chapter 344, Public-Local Laws of North Carolina, 1933, as amended is unconstitutional and void, and in accordance with said opinion it was ordered by the court that the Commissioner of Banks ignore said statute in the administration of the assets of said bank.

The Commissioner of Banks and others who had been permitted to intervene at the hearing, appealed to the Supreme Court.

Carter & Carter and Alfred S. Barnard for petitioners.
Johnston, Smathers & Rollins and C. I. Taylor for respondent.
W. A. Sullivan for intervenors.
M. G. Wallace, Amicus Curiæ.

CONNOR, J. There was no error in the order entered in this cause by Judge Alley. It is affirmed. See *Edgerton v. Hood, ante,* 816.

Affirmed.

F. E. ALLRED v. G. E. ROBBINS, BERTHA ROBBINS AND H. FOIL MICHAEL.

(Filed 24 January, 1934.)

Pleadings D b—

An action to recover on a promissory note and to set aside a conveyance of property by the maker as being fraudulent to creditors is not demurrable for misjoinder of parties and causes.

CIVIL ACTION, before *Devin, J.,* at September Term, 1933, of ALAMANCE.

The plaintiff alleged that on or about 3 December, 1930, the defendant, G. E. Robbins, executed and delivered to him certain promissory notes aggregating $5,000, and that there is an additional sum of $330.00 due on a certain check. It was further alleged that the defendant represented to the plaintiff that he owned in fee simple certain valuable real estate in Davidson County, and that thereafter, before said indebtedness or any part thereof was paid, the defendant Robbins and his wife conveyed the land to the defendant Michael for the purpose of "hindering, delaying and defrauding this plaintiff, and that the said property was sold, transferred and conveyed either totally without consideration or for a grossly inadequate consideration and that the grantee knew when taking the same that it was either for a grossly inadequate consideration or for no consideration," etc.

The plaintiff asked for judgment upon the notes and that the conveyance of the land be set aside.

The defendants demurred to the complaint upon the ground of misjoinder of parties and causes of action for that an action on tort was joined with an action on contract. The trial judge overruled the demurrer and removed the case for trial to Davidson County, and from the judgment so rendered the defendants appealed.

John S. Thomas for plaintiffs.
Cooper & Curlee for defendants.

PER CURIAM. This was an action to recover judgment upon certain promissory notes executed by the defendant Robbins and to set aside a conveyance of land executed by him and his wife to his codefendant. It is alleged that the conveyance constituted a fraud upon creditors.

The judgment overruling the demurrer is supported and warranted by the decisions in *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465, and *Carswell v. Talley,* 192 N. C., 37, 133 S. E., 181.

Affirmed.

DUNCAN TILLEY ET AL. v. C. L. LINDSAY ET AL.

(Filed 24 January, 1934.)

Mortgages H b—At expiration of agreement not to foreclose mortgagee is entitled to foreclosure if debt is not paid.

Where a consent judgment for the amount of the mortgage debt stipulates that foreclosure should be delayed for six months provided mortgagor should pay a certain sum monthly, mortgagee is entitled to foreclosure at the expiration of the period, regardless of whether the monthly payments were made as agreed, if at that time the mortgage debt is not paid or any amount tendered on the judgment.

APPEAL by plaintiffs from *Small, J.*, at February Term, 1933, of DURHAM.

W. S. Lockhart for appellants.
W. T. Towe for appellees.

PER CURIAM. This is a civil action in which the court dissolved an order restraining the defendants from foreclosing a deed of trust. A consent judgment had previously been rendered by which the defendant, C. L. Lindsay, recovered of the plaintiffs $1,650 with interest from 21 February, 1929, until paid. It was agreed that foreclosure should be delayed for a period of six months, provided the plaintiffs should pay Lindsay $25.00 on 25th day of each month during this period. Whether these payments were made is immaterial. The trustee did not undertake to foreclose the deed of trust until after the expiration of the six-month period and the plaintiffs do not claim to have paid the debt or to have tendered any amount on the judgment. Judgment

Affirmed.

STATE v. EVELYN ECCLES.

(Filed 24 January, 1934.)

1. **Constitutional Law F a—**

The admission of incriminating testimony of defendant's physical condition by witnesses who examined her without objection does not violate defendant's constitutional right not to be compelled to give evidence against herself. Art. I, sec. 11.

2. **Homicide G e—**

Evidence of defendant's guilt of unlawful homicide held sufficient to overrule her motion for judgment as of nonsuit.

APPEAL by defendant from *Moore, Special Judge,* at July Term, 1933, of FORSYTH. No error.

The defendant was tried on an indictment charging her with the murder of her unnamed child. She was convicted of manslaughter.

From judgment that she be confined in the State's prison, at hard labor, for a term of eighteen months, the defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton for the State.

William Graves and Wm. H. Boyer for defendant.

PER CURIAM. The admission of the testimony of the county physician and of the coroner, who had each examined the defendant after her arrest and before her trial, at the request of the officer who had arrested her, as evidence tending to show that defendant, a seventeen-year-old girl, had recently given birth to a child, did not violate the constitutional rights of the defendant, under section 11 of Article I of the Constitution of North Carolina.

It is provided in said section that in a criminal prosecution, the accused shall not be compelled to give evidence against himself. The defendant was not compelled by the officer or by the physician to submit her person to an examination. There was no evidence at the trial tending to show that she objected to either of the examinations. She was not compelled to give and did not give evidence against herself, either before or at the trial. The testimony as to her physical condition a few days after the discovery by the officer of the body of a dead child at her home was properly admitted as evidence. 16 C. J., 567.

The evidence offered by the State tended to show not only that defendant had killed her new-born child, but also that the homicide was unlawful, and that defendant was guilty of manslaughter at least.

There was no error in the refusal of the trial court to allow defendant's motion at the close of the evidence for the State, that the action be dismissed by judgment as of nonsuit. The defendant did not offer evidence at the trial. The evidence offered by the State was properly submitted to the jury, and was sufficient to support the contentions of the State. The judgment is affirmed.

No error.

ERNEST M. GREEN, EXECUTOR UNDER THE WILL OF MRS. KATE McGEHEE, v. A. M. BELL AND DELLA BELL.

(Filed 12 July, 1933.)

APPEAL by plaintiff from *Grady, J.*, at January-February Term, 1933, of CRAVEN. Affirmed.

Ernest M. Green for plaintiff.
Ward & Ward for defendants.

PER CURIAM. This is a petition by plaintiff, fiduciary, for advice and for instructions. From a careful review of the record, we see no error in the judgment of the court below. The judgment is

Affirmed.

HAM SHARP v. JOHN A. TATHAM.

(Filed 20 September, 1933.)

APPEAL by defendant from *Clement, J.,* and a jury, at March Term, 1933, of GRAHAM. No error.

This was a civil action. The plaintiff alleged two causes of action: First, that, the defendant was liable on a certain promissory note by reason of placing his signature upon same, and by agreeing to be responsible for said note. Second, that the defendant was liable to the plaintiff because the defendant procured the money represented by the note by means of certain fraudulent representations as alleged in the second cause of action in the complaint. The defendant denied liability, denying that he made any fraudulent representations and as to the first cause of action he pleaded the statute of frauds.

The issues submitted to the jury and their answers thereto were as follows:

"1. Is the defendant indebted to the plaintiff by reason of the plaintiff's surrendering to the defendant a bank certificate and accepting therefor certain notes referred to in the pleadings? Answer: Yes.

2. If so, in what amount? Answer: $2,000, with interest from 11 February, 1931.

3. Did the defendant by fraud and misrepresentation procure the plaintiff to surrender the bank certificate referred to in the pleadings and accept therefor the notes referred to in the pleadings? Answer: Yes."

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Morphew & Morphew for plaintiff.
T. M. Jenkins and Moody & Moody for defendant.

PER CURIAM. The first question involved: In this case, upon the pleadings and the evidence, should the court have charged the jury as to the statute of frauds, and especially as to that section that deals with the answering for the debt, default, or miscarriage of another person? We think not.

On the present record, in regard to the first cause of action, the question as to the defendant pleading the statute of frauds, C. S., 987, it is not necessary to discuss. The jury found both issues against defendant and one is sufficient to sustain the judgment. We may say though that the promise alleged and procured by plaintiff is an original and independent one and does not come within the statute of frauds.

The second question: Upon the defendant's motion for judgment of nonsuit, was there sufficient evidence of fraud to be submitted to the jury? C. S., 567. We think this question must be answered in the affirmative.

From a careful reading of the record, we think there was sufficient competent evidence to be submitted to the jury. It was a question of fact and the lines sharply drawn between the testimony of plaintiff and the defendant. The jury took plaintiff's version and we are bound by the finding. As to the competency of the evidence complained of and the charge of the court below, we can see no prejudicial or reversible error.

No error.

L. B. SMITH, ADMINISTRATOR OF PAUL SMITH, v. O. P. MATTHEWS.

(Filed 20 September, 1933.)

APPEAL by defendant from *Grady, J.*, at October Term, 1932, of WAYNE. No error.

The judgment on the former appeal to this court is as follows:

"This cause coming on to be heard and being heard at the June Civil Term, 1932, of Wayne Superior Court before his Honor, W. C. Harris, and a jury, and the jury having answered the issues submitted to it as follows:

"1. Was the death of Dr. Paul Smith caused by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. If so, did Dr. Paul Smith by his own negligence contribute to his own injury? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,250;

"And upon the coming in of the verdict, the plaintiff having moved that the answer to the third issue be set aside in the exercise of the discretion of the court, and said motion having been allowed:

"It is now thereupon considered, ordered, and adjudged by the court that the answer of the jury to the third issue as above set out be and the same is hereby set aside in the exercise of the discretion of the court, and that a partial new trial of this cause be had by the submission to a jury for answer of the third issue as above set out, to wit:

" '3. What damages, if any, is the plaintiff entitled to recover of the defendant?'

"And it is further considered, ordered and adjudged by the court that the answers of the jury to the first issue and the second issue as above set out stand as the verdict of the jury in this cause upon the said first and second issues, and that final judgment herein be rendered upon the coming in of an answer by a jury to the said third issue. . . .

"To the action of the court in setting aside the verdict on the third issue alone the defendant objects and excepts, both by reason of the lack of authority of the court to set aside said verdict and on the ground of abuse of discretion. The defendant moves to set aside the verdict on all of the issues, said motion being addressed to the discretion of the court and also being made on the ground of errors committed in the trial. Motion denied, defendant excepts. Judgment signed, defendant excepts and gives notice of appeal to the Supreme Court."

This appeal was dismissed as premature (*Smith v. Matthews,* 203 N. C., 218) on the trial of the 3rd issue as to damages before Judge Grady, the judgment was as follows:

"This cause coming on to be heard, and the jury having returned the following verdict:

"What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $4,000.

"And it appearing to the court that at June Civil Term, 1932, a verdict was rendered by a jury, wherein it was found that the death of plaintiff's intestate was caused by the negligence of the defendant, and that the cause was continued for the purpose of ascertaining what damages the plaintiff was entitled to recover. Now, upon the verdict, and on motion of Dickinson and Freeman, attorneys for the plaintiff, it is considered, ordered and

"Adjudged that the plaintiff have and recover of the defendant the sum of four thousand dollars ($4,000) and the costs of this action to be taxed by the clerk. This 21 October, 1932."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Dickinson & Freeman for plaintiff.

Charles P. Gaylor, Allen Langston, Kenneth C. Royall and James J. Hatch for defendant.

PER CURIAM. This was a civil action instituted by the plaintiff to recover of the defendant damages on account of the death of plaintiff's intestate by reason of defendant's negligent operation of an automobile. The case was first tried before his Honor, W. C. Harris, at the June Civil Term, 1932, of the Superior Court of Wayne County, the jury having answered all the issues in favor of the plaintiff, and upon the coming in of the verdict the judge presiding, on motion of counsel for plaintiff, ordered that the verdict on the third issue as to damages be set aside and that a new trial be had upon that issue. The defendant appealed to the Supreme Court from the said order and judgment made at said June Civil Term. This Court held that the appeal was premature. Thereafter, at the October Term, 1932, of said Superior Court, a retrial of said third issue as to damages was had before his Honor, Henry A. Grady.

It was agreed by counsel for plaintiff and defendant, subject to the approval of the court, that the record and transcript of case on appeal submitted to the Supreme Court on appeal from said judgment at the June Civil Term, which the Court held to be premature, shall constitute a part of the record of this case on appeal, and that all exceptions taken in said former appeal shall be treated as exceptions in this appeal, and that the record submitted and printed in said premature appeal together with the record and case on appeal upon the appeal from the judgment rendered at the October Term, 1932, upon the trial of said third issue as to damages, shall constitute the entire record and case on appeal in this case.

It was further stipulated and agreed by counsel for appellant and appellee that the briefs in said former premature appeal prepared and filed in the Supreme Court in that premature appeal shall, subject to the approval of the court, be valid briefs in this appeal upon the points covered by them.

When this case was called for trial, it appearing to the court that at a former trial the first and second issues were answered in favor of the plaintiff and, that the court set aside the verdict upon the last issue as to damages and the case was heard solely upon the question of damages.

We have examined the record of the trial heretofore had and we think there was sufficient evidence to be submitted to the jury. We see no error on that record. We see no error on the present record as to the question of damage on the third issue. On both records we can see no prejudicial or reversible error. In the judgments rendered there is

No error.

THE HARRIS CLAY COMPANY v. CAROLINA CHINA CLAY COMPANY ET AL.

(Filed 20 September, 1933.)

APPEAL by defendants from *Clement, J.*, at May Term, 1933, of JACKSON.

Civil action for damages arising *ex contractu* and *ex delicto.*

Demurrer interposed on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action and (2) for misjoinder of parties and causes.

From a judgment overruling the demurrer, the defendants appeal.

McBee & McBee, Dan K. Moore, McKinley Edwards and E. P. Stillwell for plaintiff.

Berry & Green, Morgan & Gardner and Carter & Carter for defendants.

PER CURIAM. This is the same case that was here at the Spring Term, 1932, on a question of venue, reported in 203 N. C., 12.

The second ground of the demurrer seems to have been abandoned, and it was properly overruled on the first. The complaint contains allegations of damages arising *ex delicto,* which may have been overlooked, as they are not debated on brief; and a demurrer will be overruled unless the complaint is wholly insufficient. *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874.

The question of the measure of plaintiff's allowable recovery is not presently presented. *Pemberton v. Greensboro,* 203 N. C., 514, 166 S. E., 396.

Affirmed.

ROBERT S. AUSTIN v. TINE WILLIS.

(Filed 20 September, 1933.)

APPEAL by defendant from *Barnhill, J.,* at May Term, 1933, of DARE. No error.

The object of the action is to enjoin the defendant from interfering with the plaintiff's use of a certain road and to require the removal of obstructions placed on it by the defendant. The jury returned the following verdict:

1. Is the plaintiff the owner and entitled to the possession of the tract of land described in paragraph 1 of the complaint, as alleged? Answer: Yes.

2. If so, is the plaintiff the owner of an easement appurtenant to said tract of land described in paragraph 1 of the complaint, as a driveway from said tract of land to the neighborhood road and thence to the public road as the same is now laid out and in use? Answer: Yes.

3. If so, did the defendant wrongfully obstruct said driveway, as alleged? Answer: Yes.

Judgment for plaintiff; appeal by defendant.

M. B. Simpson for appellant.

Worth & Horner for appellee.

PER CURIAM. The only question raised by the defendant is whether the evidence justifies the finding that the plaintiff has an easement in the driveway described in the complaint as appurtenant to his land. It is insisted that the user must be "adverse and of right," as pointed out in *Mebane v. Patrick,* 46 N. C., 23; that the plaintiff has failed to show that the defendant had knowledge of any claim of right to the asserted easement; and that the action should have been dismissed. We think there is sufficient evidence to sustain the finding; and the charge as to adverse user is clear, explicit, and free from error.

No error.

RUDOLPH ALONZO v. J. S. CLAVERIE ET AL.

(Filed 20 September, 1933.)

APPEAL by defendants from *Alley, J.,* at June Term, 1933, of BUNCOMBE. Affirmed.

Bourne, Parker, Bernard & DuBose for appellants.
Carle W. Greene and J. W. Pless for appellee.

PER CURIAM. *Brogden, J.,* not sitting, the Court is evenly divided in opinion. The judgment of the Superior Court is therefore affirmed without becoming a precedent. *Raynor v. Ins. Co.,* 193 N. C., 385; *Lawrence v. Bank, ibid.,* 841; *Tarboro v. Johnson,* 196 N. C., 824.

Affirmed.

WILLIAM J. COCKE, JR., AND T. A. UZZELL, JR., TRUSTEES, v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 20 September, 1933.)

Banks and Banking H e—

Judgment that plaintiff was entitled to preferred claim in assets of insolvent bank affirmed upon authority of *Flack v. Hood, Comr.*, 204 N. C., 337.

APPEAL by defendant from *McElroy, J.,* at July Term, 1933, of BUNCOMBE. Affirmed.

Civil action to have plaintiffs' claim against the Central Bank and Trust Company of Asheville, N. C., adjudged a preferred claim upon the assets of said Bank and Trust Company, which are now in the possession of the defendant as Commissioner of Banks for liquidation.

On the facts found without objection by the court, it was ordered and adjudged that plaintiffs recover of the defendant the sum of $4,072.66, with interest from 19 November, 1930, and the costs of the action; and that said sum is a preferred claim upon the assets of the Central Bank and Trust Company of Asheville, N. C., and shall be paid as such by the defendant in the liquidation by him of said assets.

From this judgment, the defendant appealed to the Supreme Court.

T. A. Uzzell, Jr., and William J. Cocke, Jr., for plaintiffs.
Johnson, Smathers & Rollins for defendant.

PER CURIAM. The facts found by the court without objection in this action are substantially the same as in *Flack v. Hood, Comr.,* 204 N. C., 337, 168 S. E., 520. The judgment is affirmed on the authority of the decision in that case.

If the effect of the decision in *Flack v. Hood, Comr.,* is to give priority upon the assets of a banking corporation organized under the laws of this State, upon its insolvency, to claims arising out of transactions with its trust department, which is maintained under provisions of its charter, authorized by statute (N. C. Code of 1931, section 217(a), and the result is deemed unjust to depositors in its commercial or savings department, the remedy must be had by legislation. So long as a banking corporation organized under the laws of this State, maintains, as authorized by its charter, a commercial, a savings and a trust department, and does business in each department, the decision in *Flack v. Hood, Comr.,* must remain the law of this State. That decision is in accord with the authorities, and with well settled principles of equity, as administered by courts exercising under constitutional provisions, equitable jurisdiction.

Affirmed.

J. B. PHILLIPS v. BALMO LUMBER COMPANY ET AL., AND MANUFACTURERS ACCEPTANCE CORPORATION, v. BALMO LUMBER COMPANY ET AL., AND J. A. COOK ET AL., INTERVENERS.

(Filed 20 September, 1933.)

APPEAL by defendants, Balmo Lumber Company and Manufacturers Acceptance Corporation, from *Alley, J.,* at Chambers in Asheville, 15 February, 1933. From CHEROKEE.

Civil action to recover for handling lumber and to declare void certain transfers alleged to have been made in fraud of plaintiff's rights as a creditor.

As the matter involved an accounting, the case was referred under the statute which resulted in a report and judgment for the plaintiff. It is agreed "there was sufficient competent evidence to support the findings of fact of the referees, . . . which findings of fact were reviewed and affirmed by the judge of the Superior Court."

From the judgment entered in favor of plaintiff and interveners, the defendants, Balmo Lumber Company and Manufacturers Acceptance Corporation, appeal.

J. B. Gray for Phillips, plaintiff, and Bristol, sheriff, appellees.

L. B. Prince for Balmo Lumber Company and Manufacturers Acceptance Corporation.

R. L. Phillips for Cook, interveners.

PER CURIAM. The case is settled by the findings of fact, which, it is agreed, are supported by sufficient competent evidence. *Corbett v. R. R., ante,* 85.

Affirmed.

THE FEDERAL LAND BANK OF COLUMBIA v. L. D. MANEY AND WIFE, M. N. MANEY ET AL.

(Filed 20 September, 1933.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Alley, J.,* at February Term, 1933, of BUNCOMBE.

Civil action for debt and to foreclose mortgage.

From a verdict and judgment for defendants, the plaintiff appeals, assigning errors.

Charles E. Jones and Arthur W. Holler, Jr., for plaintiff.

J. E. Swain for defendants.

PER CURIAM. The Court being evenly divided in opinion, *Brogden, J.,* not sitting, the judgment stands affirmed without becoming a precedent in accordance with the general rule of appellate courts in such situations. *Garrison v. R. R.*, 202 N. C., 851, 164 S. E., 115; *Nebel v. Nebel*, 201 N. C., 840, 161 S. E., 223; *Durham v. Lloyd*, 200 N. C., 803, 157 S. E., 136.

Affirmed.

ELSIE POOL HORNE v. C. W. HORNE, ADMINISTRATOR OF ASHLEY HORNE, DECEASED, AND C. W. HORNE, INDIVIDUALLY.

(Filed 11 October, 1933.)

APPEAL by certain petitioners from *Frizzelle, J.*, at April Term, 1933, of JOHNSTON. Dismissed.

This is an action to recover on a note for $1,688.57, executed by Ashley Horne and Son, and now owned by the plaintiff.

From the order of the clerk of the Superior Court of Johnston County, denying the petition that the petitioners be made parties defendant in the action, and have leave to file an answer to the complaint, the petitioners appealed to the judge who affirmed the order of the clerk. The petitioners appealed to the Supreme Court.

Winfield H. Lyon and E. J. Wellons for plaintiff.

Parker & Lee and Ruark & Ruark for C. A. Gosney, trustee.

Parker & Lee for Farmers Bank of Clayton, and Weisner Farmer, receiver.

PER CURIAM. The petitioners are not necessary parties to the action. The order denying their petition is not reviewable by this Court. For that reason, the appeal is

Dismissed.

ELSIE POOL HORNE v. C. W. HORNE, ADMINISTRATOR OF ASHLEY HORNE, DECEASED, AND C. W. HORNE, INDIVIDUALLY.

(Filed 11 October, 1933.)

APPEAL by certain petitioners from *Frizzelle, J.*, at April Term, 1933, of JOHNSTON. Dismissed.

This is an action to recover on a note for $5,000, executed by Ashley Horne and Son, and now owned by the plaintiff.

From the order of the clerk of the Superior Court of Johnston County, denying the petition that the petitioners be made parties defendant in the action, and have leave to file an answer to the complaint, the petitioners appealed to the judge who affirmed the order of the clerk. The petitioners appealed to the Supreme Court.

Winfield H. Lyon and E. J. Wellons for plaintiff.
Parker & Lee and Ruark & Ruark for C. A. Gosney, trustee.
Parker & Lee for Farmers Bank of Clayton, and Weisner Farmer, receiver.

Per Curiam. The petitioners are not necessary parties to the action. The order denying their petition is not reviewable by this Court. For that reason, the appeal is
Dismissed.

J. T. STRAUGHN v. CAPITAL COCA-COLA COMPANY.

(Filed 22 November, 1933.)

Appeal by plaintiff from *Cranmer, J.*, at Second March Term, 1933, of Wake.

Civil action to recover damages for injury arising from the alleged negligence of the defendant in placing on the market a bottle of coca-cola containing the decomposed remains of a mouse, which was purchased by the plaintiff and partially consumed by him.

Upon denial of liability, the issue of negligence was answered by the jury in favor of the defendant. From judgment thereon, the plaintiff appeals, assigning errors.

Gatling & Morris for plaintiff.
J. N. Duncan, E. E. Duncan and Murray Allen for defendant.

Per Curiam. The case seems to have been tried in substantial conformity to the decisions on the subject. *Corum v. Tobacco Co., ante,* 213; *Broadway v. Grimes,* 204 N. C., 623, 169 S. E., 194; *Perry v. Bottling Co.,* 196 N. C., 175, 145 S. E., 14. The appeal presents no new question of law or one not heretofore settled by a number of decisions. The verdict and judgment will be upheld.
No error.

HENRY O. WOMACK v. S. O. THORNE, WADE W. WELCH, GRINNELL COMPANY, INCORPORATED, AND GENERAL FIRE EXTINGUISHER COMPANY.

(Filed 22 November, 1933.)

APPEAL by plaintiff from *Cowper, Special Judge,* at June Term, 1933, of MECKLENBURG. Affirmed.

Taliaferro & Clarkson and Carswell & Ervin for plaintiff.
C. H. Gover and William T. Covington, Jr., for defendants.

PER CURIAM. This was a motion made by the defendants for the removal of the action to the United States District Court for the Western District of North Carolina for improper joinder of parties plaintiff. The clerk of the Superior Court allowed the motion and on appeal to the Superior Court the judgment was affirmed. The plaintiff appealed to the Supreme Court assigning error. The judgment of the Superior Court is affirmed. *Brown v. R. R.,* 204 N. C., 25; *Culp v. Ins. Co.,* 202 N. C., 87; *Overton v. R. R., ibid.,* 848; *Matthews v. Lumber Co.,* 198 N. C., 129; *Wright v. Utility Co., ibid.,* 204; *Ferris v. R. R.,* 194 N. C., 653.

Affirmed.

J. R. CHERRY v. CITY OF CHARLOTTE.

(Filed 22 November, 1933.)

CIVIL ACTION, before *Oglesby, J.,* at May Term, 1933, of MECKLENBURG.

The plaintiff owned a tract of land on the Derita Road near the city of Charlotte. He developed this land into residential lots and to add to the desirability of the lots laid a water line about 3,500 feet long. The defendant city gave permission for the laying of such water line and furnished the specifications therefor and supervised the construction. The cost of the line was approximately $1,700, which was paid by the plaintiff.

The plaintiff testified as follows: "He arranged with Mr. Vest, superintendent of the water department of the city, that he would not take any one on my line without an order from me. He was to get an order from me and when I gave the order to him the tapping fee was to be paid to me, and I was to write an order to Mr. Vest after that, and he was then to connect the water and charge them for the water. . . . The city made one connection that I know of for a man named Freeze . . . without my consent or without notifying me. . . . When I ran my water line out there I expected the city would run water through it and that it would charge for the water. . . . Provision was made in front of each lot so that you just had to tap on to get the water in there. . . . We just put a little T there so that they could get into the house. I do not contend that I still own the water line. I say the city owns it all. The city evidently owns it all. I say that because they permitted one man to tap on that they own it all now."

Upon the foregoing evidence the plaintiff contended that as the city had permitted a man named Freeze to tap the water line owned by him that such tapping constituted an appropriation by the city of the whole line, and consequently the plaintiff brought suit for the value of his property.

The city denied that it had appropriated any property belonging to the plaintiff.

The following issues were submitted to the jury:

1. "Was the plaintiff the owner of the pipe line in March, 1930, as alleged in the complaint?"

2. "Did the defendant appropriate to its own use any part of or all of plaintiff's pipe line in March, 1930, as alleged in the complaint?"

3. "What was the value of the line or the part thereof appropriated by the defendant in March, 1930?"

The first issue was answered "Yes"; the second issue "Yes, one tapping," and the third issue "$65.00."

From judgment upon the verdict the plaintiff appealed.

J. F. Flowers and J. Louis Carter for plaintiff.
W. S. Blakeney and Bridges & Orr for defendant.

PER CURIAM. The plaintiff owned and constructed a water line and made provisions in such construction for taps to be made for the use of purchasers of lots in his subdivision. Moreover he constructed the line as he testified with the full knowledge that the city would run water through it and that it would charge for the water. There was evidence that the city had given one person permission to tap the line without the consent of plaintiff, and that the regular tapping fee was $65.00. The city denies that it has appropriated the property.

All phases of the case were submitted to the jury by the trial judge, and no error of law appears in the record.

Affirmed.

STATE v. J. C. JOHNSON.

(Filed 13 December, 1933.)

APPEAL by defendant from *Cranmer, J.*, at March Term, 1933, of WAKE. No error.

This is a criminal action in which the defendant was convicted of an assault with a deadly weapon, as charged in the indictment.

From judgment that he be confined in the common jail of Wake County for a term of 12 months, and assigned to work on the public roads of said county, the defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

John W. Hinsdale for defendant.

PER CURIAM. There is no error in the instruction of the court to the jury, which defendant assigns as error on his appeal to this Court. The instruction does not violate C. S., 564. *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402. The judgment is affirmed.

No error.

EVA McGARITY v. J. B. IVEY AND COMPANY.

(Filed 13 December, 1933.)

APPEAL by plaintiff from *Hill, Special Judge,* at Special April Term, 1933, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury.

The complaint alleges that on 11 May, 1932, the plaintiff, a customer in defendant's department store, Charlotte, N. C., while going down the basement steps, for the purpose of making a purchase, tripped on the 7th step of the stairway, by catching the heel of her shoe between the metal strip or nosing on the front edge of said step and the worn linoleum just back of the metal strip or nosing, and fell, which resulted in serious injury and damage to plaintiff.

Upon denial of liability, and issues joined, the jury answered the issue of negligence in favor of defendant. From the judgment entered thereon, the plaintiff appeals, assigning errors.

Carswell & Ervin and Elbert E. Foster for plaintiff.

Tillett, Tillett & Kennedy for defendant.

PER CURIAM. The case was tried below and argued here by counsel with their accustomed zeal and earnestness. Nothing seems to have been overlooked or omitted which would have benefited either side, and we have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. The jury has responded in favor of the defendant on a sharply controverted issue of fact. The verdict and judgment will be upheld.

No error.

IN THE MATTER OF THE BANK OF MURPHY; APPEAL OF R. L. ANDERSON FROM STOCK ASSESSMENT AND ACTION FOR PREFERRED CLAIM ON ACCOUNT OF RECOVERY OF AMOUNT CLAIMED AS PAYMENT FOR STOCK.

(Filed 10 January, 1934.)

1. **Pleadings D a—**

A complaint is not demurrable unless wholly insufficient.

2. **Pleadings D e—**

A demurrer admits relevant facts alleged and relevant inferences of fact deducible, but not conclusions or inferences of law.

3. **Appeal and Error E h—**

On appeal from the sustaining of a demurrer to the complaint defenses set forth in the answer filed in the cause are not presented for review.

APPEAL by R. L. Anderson, from *Clement, J.*, at June Term, 1933, of CHEROKEE. Reversed.

The following stipulation by counsel is in the record:

"In the above entitled cause, pending on appeal to the Superior Court from assessment levied by the Commissioner of Banks against R. L. Anderson, and said Anderson having filed with the Commissioner of Banks a tendered proof of preferred claim in the sum of $500.00, which claim has been rejected by the Commissioner of Banks:

Now, therefore, it is, by consent, stipulated and agreed between counsel for R. L. Anderson and counsel for the Commissioner of Banks that complaint and appeal in this cause shall be treated as an action properly instituted against the Commissioner of Banks, on relation of the Bank of Murphy, to recover upon said preferred claim, in the Superior Court of Cherokee County, and same shall be treated and considered as a properly instituted action to recover thereon, and that the court shall enter such judgment herein as the facts and the law doth warrant, treating the entire record in this cause as the record of an action originally instituted in said court.

This stipulation is made for the reason that the proof of preferred claim herein as filed in the complaint in the action upon the preferred claim is in the identical words and language of the appeal from stock assessment and that upon any trial of the cause the evidence upon the question of appeal from the stock assessment and the evidence in support of the preferred claim would be identical, and for the further purpose of saving cost."

The order of the Commissioner of Banks, is as follows:

"Order No. 193, North Carolina, office of Commissioner of Banks—Docketed 13 May, 1933. Under and by virtue of the authority contained in subsection 13 of section 218(c), Consolidated Statutes, it appearing to the Commissioner of Banks that an assessment against the stockholders of the Bank of Murphy, Murphy, North Carolina, is necessary in order to discharge the liability to general creditors of the said Bank of Murphy, the Commissioner of Banks of the State of North Carolina hereby levies an assessment against the stockholders of the Bank of Murphy equal to the stock liability of each stockholder, the amount of stock owned by him by record of the said Bank of Murphy and amount of assessment against each of said stockholders being as follows: Name: R. L. Anderson, address—Brasstown, N. C.—No. of shares: 5, assessment: $500.00. By order of the Commissioner of Banks of the State of North Carolina. This 5 April, 1933. Gurney P. Hood, Commissioner of Banks. (Official seal.)"

R. L. Anderson, on appeal from the above assessment, sets forth an original lengthy and amended detailed complaint, why the assessment against him was void and also proof of preferred claim. The prayer is as follows: "Wherefore, appellant prays the court: (1) That the assessment attempted to be made by the Commissioner of Banks be set aside and declared void and of no effect. (2) That the court direct and require the Commissioner of Banks to refund to your appellant as a claim against the assets of the Bank of Murphy entitled to priority, the sum of $500.00 paid by reason of the stock subscription aforesaid. (3) For general relief, together with costs."

The Commissioner of Banks demurred *ore tenus* and set forth lengthy reasonings: "Demurrer *ore tenus* as dictated into record upon the hearing of this cause by counsel for Commissioner of Banks."

The record also discloses a lengthy answer to R. L. Anderson's complaint on the part of the Commissioner of Banks. The court below sustained the demurrer, and R. L. Anderson appealed to the Supreme Court.

Moody & Moody and D. Witherspoon for appellant, R. L. Anderson.
Gray & Christopher for appellee, Commissioner of Banks.

PER CURIAM. The appellant, R. L. Anderson, sets forth as follows the question involved: "The only question involved in this appeal is whether the court committed an error in sustaining the demurrer *ore tenus* of Gurney P. Hood, Commissioner of Banks to the grounds set out by R. L. Anderson, appellant, on his appeal from a stock assessment on stock alleged to be owned by him in the Bank of Murphy." We think the demurrer should have been overruled.

We have read the record thoroughly and think the demurrer should have been overruled. The complaint is not demurrable unless wholly insufficient. A demurrer admits all allegations in complaint. A demurrer admits relevant facts alleged and relevant inferences of fact deducible. A demurrer does not admit conclusions or inferences of law. *Stepp v. Stepp,* 200 N. C., 237; *Andrews v. R. R.,* 200 N. C., 483; *Shaffer v. Bank,* 201 N. C., 415. A speaking demurrer is bad. *Ellis v. Perley,* 200 N. C., 403.

The answer is in the record, but cannot be considered. When filed and the facts are established on the hearing, questions would arise which we do not now consider. This is another question. As the case goes back for a hearing on its merits, we do not analyze the complaint, but think it sufficient on the question of stock assessment. The judgment below is

Reversed.

W. L. EVERHART v. SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 10 January, 1934.)

APPEAL by plaintiff from *Cowper, Special Judge,* at November Term, 1933, of FORSYTH. Affirmed.

Parrish & Deal and Fred S. Hutchins for plaintiff.
Manly, Hendren & Womble for defendants.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury resulting from the collision of an automobile and a street car. The county court dismissed the action as in case of nonsuit and on appeal the Superior Court affirmed the judgment. As the record contains no adequate evidence of actionable negligence the judgment is

Affirmed.

C. B. PHILLIPS AND WIFE, CARRIE V. PHILLIPS, v. IDEAL MERCERIZING COMPANY.

(Filed 10 January, 1934.)

Corporations D e—Contract of solvent corporation to purchase its stock is valid.

A solvent corporation entered into a contract to purchase a certain number of shares of its capital stock from a stockholder. The stockholder delivered part of the stock, and the parties agreed that if the remainder were not delivered within a specified time the corporation's damages resulting from the breach should be entered as a credit on the balance due on the stock purchased. The stockholder failed to deliver the remainder of the stock within the time prescribed and action was brought to assess damages for such failure. *Held,* the contract was valid, *Fuller v. Service Stores,* 190 N. C., 655, involving an attempt to enforce such contract against an insolvent corporation, not being applicable to this case, and the corporation was entitled to a credit for the amount of damages assessed by the jury.

APPEAL by defendant from *Devin, J.,* at September Term, 1933, of ALAMANCE. No error.

On 18 April, 1932, the plaintiffs entered into a contract, in writing, by which they sold and agreed to deliver to the defendant, 400 shares of the capital stock of the defendant corporation, which the plaintiff then owned. The defendant paid to the plaintiffs on the purchase price for said shares of stock the sum of $2,500, in cash, and agreed to pay the balance, to wit: $5,000, in monthly installments as set out in the contract. At the date of this contract, the plaintiffs delivered to the defendant certificates for 350 shares of said stock.

Thereafter, on 27 April, 1932, the plaintiffs notified the defendant that they were unable to deliver to the defendant certificates for the remaining 50 shares of said stock, for the reason that said certificates were then held by a bank as collateral security for an indebtedness to said bank on which the plaintiffs were liable. It was thereupon agreed, in writing, by and between the plaintiffs and the defendant that if the plaintiffs should fail to redeem the said certificates, and deliver the same to the defendant, within 60 days, in accordance with their contract dated 18 April, 1932, the defendant should have the right to retain the amount of the damages which the defendant had sustained by the breach of their contract by the plaintiff, with respect to the said 50 shares of stock, and that said amount should be applied as a credit on the balance due by defendant to the plaintiffs under the contract dated 18 April, 1932. The plaintiffs have failed to redeem said certificates, and have thereby breached their contract to deliver to the defendant 400 shares of its stock.

This action was instituted by plaintiffs to have the amount of damages which the defendant has sustained by the breach of their contracts by the plaintiff, assessed, to the end that said amount may be applied as a credit on the balance due by defendant to the plaintiff under the contract dated 18 April, 1932.

At the trial, in response to issues submitted by the court, the jury assessed the damages which defendant is entitled to recover of the plaintiffs, for the breach of their contracts, at $1,500. Judgment was thereupon rendered that plaintiffs recover of the defendant the sum of $3,500, and the costs of the action. The defendant appealed to the Supreme Court.

John S. Thomas and John J. Henderson for plaintiffs.
Long & Long for defendant.

PER CURIAM. An examination of the record in this appeal fails to disclose any error in the trial of this action in the Superior Court. The judgment is, therefore, affirmed.

Fuller v. Service Co., 190 N. C., 655, 130 S. E., 545, in which the validity of contracts by which corporations, which have become insolvent, have agreed to purchase from stockholders shares of their stock, which the said stockholders had purchased in reliance upon such contracts, is discussed, has no application to the instant case. No facts are alleged in the pleadings or shown by the evidence at the trial of this action, upon which it could be held that the contracts between the plaintiffs and the defendant are void. The contracts are valid, and the only matter in controversy between the parties is the amount of damages which the defendant is entitled to recover of the plaintiffs, for the admitted breach of their contracts. This amount was assessed by the jury at the trial, which is free of error, at $1,500.

No error.

R. W. CHADWICK v. ELIZABETH T. O'BRYAN AND ALLAN D. O'BRYAN.

(Filed 10 January, 1934.)

CIVIL ACTION, before *Grady, J.,* at June Term, 1933, of CARTERET.

It is alleged in the complaint that the defendant, Allan D. O'Bryan, was a minor living with his mother, the defendant, Elizabeth T. O'Bryan, who "was the owner of an automobile, and that said automobile was obtained, kept and maintained by the said Elizabeth T. O'Bryan for the comfort, pleasure and convenience of herself and her family, . . . and at the dates hereinafter alleged the said automobile was being operated by the defendant, Allan D. O'Bryan, with the knowledge, consent and special permission of his mother, Elizabeth T. O'Bryan." The answer of Elizabeth T. O'Bryan admitted "that this defendant, on the date mentioned, owned an automobile, and that her son, Allan D. O'Bryan, used the same with her consent." The evidence tended to show that on 2 January, 1932, the plaintiff had driven his horse and cart into the town of Beaufort. He stopped at the curbing at Thomas Sadler's to deliver some borrowed clothes, and while his cart was so standing the automobile of defendant, driven by her son, Allan O'Bryan, collided with the cart, breaking the same to pieces and throwing the plaintiff to the ground, inflicting as the plaintiff contended, serious and permanent injuries.

The plaintiff had no light upon his cart and there was some contradiction in the evidence as to whether it was dark at the time. Plaintiff said that it was "about dusk or it may have been a little after sundown. . . . It was just dusky a little." Another witness for plaintiff who was a merchant and waiting on customers at the time, said: "I could see his cart well enough. I hadn't turned on the lights in my store." Another witness for plaintiff testified: "I judge it was a few minutes after five o'clock. I could see all right." Another witness for plaintiff said: "It was not dark, . . . and I had not put on my lights." There was evidence tending to show that the car was being driven at the rate of thirty-five or forty miles an hour, and that the car of defendant "stopped about seventy-five to eighty yards from where the cart was."

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff.

From judgment upon the verdict, awarding $3,000 damages, the defendant, Elizabeth O'Bryan, appealed.

C. R. Wheatley for plaintiff.
Julius F. Duncan for defendants.

PER CURIAM. There was sufficient evidence of negligence to be submitted to the jury. The defendant requested certain instructions, which were refused by the trial judge, but an examination of the charge discloses that the substance of such instructions was submitted to the jury. Indeed, an examination of the record leaves the impression that the merit of the controversy involved an issue of fact which has been determined adversely to the defendant.

Affirmed.

RAY S. SMITH v. INTERNATIONAL AGRICULTURAL CORPORATION ET AL.

(Filed 10 January, 1934.)

Mortgages H b—

> Judgment continuing to final hearing a temporary order restraining foreclosure of mortgage upon real dispute as to the accuracy of description and the amount secured by the mortgage is affirmed on authority of *Parker Co. v. Bank,* 200 N. C., 441.

APPEAL by defendants from *Moore, Special Judge,* at March Term, 1933, of WAYNE.

Civil action to restrain foreclosure of deed of trust until the accuracy of the description of the lands intended to be conveyed thereby can be ascertained, and the amount of the debt secured thereby can be determined—there being a dispute as to the correctness of both.

From a judgment continuing the temporary restraining order to the final hearing, the defendants appeal.

W. A. Dees for plaintiff.
Wyatt E. Blake for defendant corporation.

PER CURIAM. Affirmed on authority of *Parker Co. v. Bank,* 200 N. C., 441, 157 S. E., 419, *Wilson v. Trust Co., ibid.,* 788, 158 S. E., 479, and *Broadhurst v. Brooks,* 184 N. C., 123, 113 S. E., 576.

Affirmed.

J. C. MALLARD v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 10 January, 1934.)

CIVIL ACTION, before *Harris, J.,* at March Term, 1933, of DUPLIN.

The evidence tended to show that on 24 March, 1924, the defendant issued and delivered to the plaintiff a certain policy of insurance, providing that: "If the insured becomes totally and permanently disabled and is thereby prevented from performing any work or conducting any business for compensation or profit, . . . the company will, if there has been no default in the payment of premiums, waive the payment of all premiums falling due during such disability after the receipt of such proof;

"If such disability existed before the insured attained the age of sixty years, the company will pay to the insured the sum of ten dollars for each one thousand dollars of the amount of insurance and will pay the same sum on the same day of every month thereafter during the lifetime and the continuance of such disability of the insured, the first payment to become due on evidence of such disability."

The plaintiff offered evidence to the effect that he became disabled within the terms of the policy in August, 1925. There was also evidence to the contrary.

The following issue was submitted to the jury: "Did the plaintiff on 30 August, 1925, become totally and permanently disabled, and thereby prevented from performing any work or conducting any business for compensation or profit." The jury answered the issue "No," and from judgment upon the verdict denying recovery, the plaintiff appealed.

Oscar B. Turner for plaintiff.
Kenneth C. Royall and Wm. F. Howland for defendant.

PER CURIAM. An examination of the record discloses no reversible error either in the admission of evidence or in the charge of the trial judge. The merit of the controversy involved an issue of fact, and such issue has been determined by the jury adversely to the plaintiff.

Affirmed.

MRS. JESSIE WINFREY AND R. W. WINFREY, HER HUSBAND, v. W. J. SPEAS.

(Filed 24 January, 1934.)

APPEAL by plaintiffs from *Sink, J.*, at June Term, 1933, of FORSYTH. Affirmed.

Elledge Wells for appellants.
Ingle & Rucker for appellee.

PER CURIAM. On 4 January, 1923, the plaintiffs executed and delivered to the defendant a mortgage deed to secure a note in the sum of $800.00 which was payable on 4 January, 1924.

The plaintiffs brought suit to enjoin foreclosure of the mortgage, alleging that at the time of execution it was agreed by the parties that the mortgagors should have the right to sell the timber situated on the mortgaged land. This was denied by the defendant. The case was tried in the Forsyth County Court and at the close of the plaintiffs' evidence was dismissed as in case of nonsuit, and on appeal to the Superior Court the judgment was affirmed. The plaintiffs excepted and appealed.

R. W. Winfrey testified as follows: "I first discovered that the provision permitting me to cut and sell timber to pay the debt was not in the mortgage when I carried it home to my wife and she read it to me. I knew at that time that the provision was not in there, and I knew it when I handed it to Mr. Speas after my wife and I had signed it, and I told Mr. Speas it wasn't in there. My wife told me that that provision was not in the mortgage before I signed it and I knew it wasn't in there when I signed it."

The record shows that the action is not founded on fraud but on breach of contract. The provision was evidently not omitted from the mortgage by reason of fraud or mistake. The defendant contends that even if the alleged agreement was made, it was not supported by a valid consideration, that the mortgagors had a legal right to cut and remove the timber without the consent of the mortgagee unless the security was thereby impaired (19 R. C. L., 323), and that the plaintiffs are not entitled to relief growing out of their failure to exercise a legal right.

We have examined the record and the exceptions and are of opinion that the judgment should be affirmed. Judgment

Affirmed.

ADOLPHUS C. DEAN v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 24 January, 1934.)

CIVIL ACTION, before *Clement, J.*, at September Term, 1933, of ROCKINGHAM.

The evidence tended to show that on 1 January, 1920, the defendant executed and delivered to the Riverside and Dan River Cotton Mills of Danville, Virginia, a certain group one-year renewable term insurance policy, designated as No. 726-G. The plaintiff was an employee of the mills and serial certificate No. 19991-D was duly issued to him as such employee. This certificate provided for insurance in the sum of $500.00, and further stipulated that the insurance should be automatically increased for each additional year of employment at the rate of $100.00 per annum until a maximum of $1,500 was reached. The group policy provided that on receipt of notice by the home office "that any employee insured hereunder has become wholly and permanently disabled by accidental injury or disease, before attaining the age of sixty years, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit, the company will waive the payment on each premium applicable to the insurance on the life of such disabled employee . . . , and in addition to such waiver, will pay to such employee during such disability in full settlement of all obligations hereunder pertaining to such employee." The installments payable, were based upon the amount of the policy at the time of the occurrence of the disability. The serial certificate held by the plaintiff also provided for permanent disability and in such event a payment was provided in five annual installments of $214.00 each for $1,000 of insurance. The group policy was canceled on 31 August, 1930.

The plaintiff alleged and offered evidence tending to show that he became wholly disabled by disease, to wit, pellagra, prior to the cancellation of the policy. He testified that about the latter part of July or the first of August, 1930, he became disabled and unable to work, suffering "with physical weakness and troubled with my head, back and stomach. I visited some of my relatives in the latter part of August or the first of September, 1930. I was not able to sit up at that time. I was not able to look after myself. . . . Back in August, 1930, I staggered when I walked, . . . I was having trouble with my head in the spring of 1930 on up until August. It made me stagger when I walked. I could not walk straight." Other evidence offered by plaintiff tended to show that he was permanently disabled within the meaning of the policy prior to the cancellation, and that continuously since said time he had grown worse and was wholly incapacitated at the time of the trial.

The defendant offered evidence tending to show that the plaintiff worked steadily and continuously in the mill as shown by the time sheet until the week ending 23 August, 1930. He did not work from that time until 20 September. During the week ending 27 September he made forty-five hours. "Then there was a strike and no one was in the mill." Other testimony offered by the defendant tended to show that the plaintiff was walking about on the street during the strike and that he had made no complaint as to sickness or disability.

The following issues were submitted to the jury:

1. "Is the plaintiff, at the present time, as the result of accidental injury or disease, wholly and permanently disabled so that he is now, and will be, permanently, continuously, and wholly prevented thereby from performing any work for compensation or profit?

2. "Did the plaintiff become wholly and permanently disabled by accidental injury or disease on or before 31 August, 1930, and while in the employ of the Riverside and Dan River Cotton Mills, Incorporated, so that he has been, from on or before 31 August, 1930, and until the

present time, permanently, continuously and wholly prevented thereby from performing any work for compensation or profit?"

The jury answered the first issue "Yes," and the second issue "No."

From judgment upon the verdict in favor of defendant the plaintiff appealed.

P. T. Stiers for plaintiff.
Smith, Wharton & Hudgins for defendant.

PER CURIAM. The verdict established the fact that the plaintiff was not totally incapacitated within the meaning of the policy prior to its cancellation, and of course upon such verdict he is not entitled to recover.

There are certain exceptions to the admission of testimony and to the charge of the trial judge, but none of these are of sufficient moment to overthrow the judgment. The charge of the court, viewed and interpreted as a unit, does not transgress the principles of law pronounced in the case of *Bulluck v. Ins. Co.,* 200 N. C., 642, 158 S. E., 185.

Affirmed.

Z. R. BRADSHAW AND IDA E. BRADSHAW, HIS WIFE, v. TIDEWATER POWER COMPANY.

(Filed 24 January, 1934.)

CIVIL ACTION, before *Harris, J.,* at March Term, 1933, of DUPLIN.

The board of education of Duplin County owned a building known as the teacherage. The plaintiffs leased the building from the county and moved into the house on or about 30 December, 1927. The building was operated by the plaintiffs as a boarding house for teachers. When the building was completed the same was wired by the defendant and this work was finished on or about the time the plaintiffs took possession. After the first of January, 1928, the defendant furnished current for the building continuously from said date until about 6 September, 1928, when the building was destroyed by fire.

Plaintiffs allege that they lost certain personal property in the fire and in addition, sustained a loss of profits through inability to operate the teacherage. An action for damages was brought in June, 1929, and in the complaint filed the plaintiffs alleged that the wiring was improperly and negligently done, and that such negligence was the cause of the fire. After hearing the evidence Special Judge Moore, nonsuited the cause and thereafter the present suit was instituted on or about 1

September, 1931. At the close of the evidence the trial judge nonsuited the action upon the ground that the plaintiff had failed to make out a case against the defendant and upon the further ground that the court found as a fact "that this action is between the same parties upon the same cause of action and involves the same issues as the motion heretofore tried before Special Judge Clayton Moore, and that it appeared from this trial of the action that this suit is based upon substantially identical allegations and substantially identical evidence, and that the merits of the second issue are identically the same as the first cause," etc.

From judgment rendered plaintiffs appealed.

Geo. R. Ward for plaintiffs.
Beasley & Stevens and L. J. Poisson for defendant.

PER CURIAM. The merit of this cause is determined by the opinion in the case of *Merritt v. Power Co., ante,* 259. The decision in the *Merritt case* was filed in October, 1933, and was, therefore, not available to the parties at the time this action was tried.

Affirmed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Federal Land Bank *v.* Gaines, 204 N. C., 278, reversed.

State *ex rel.* Maxwell *v.* Kent-Coffey Mfg. Co., 204 N. C., 365, affirmed.

APPENDIX

STATE EX REL. ATTORNEY-GENERAL v. HERMAN WOODWARD WINBURN.

ORDER.

In this motion by the Attorney-General to revoke the license or disbar Herman Woodward Winburn from the practice of law, it appearing that the respondent has filed an answer to the petition of the Attorney-General raising certain issues of fact;

It is now, therefore, ordered that the matter be referred to a committee of the bar of this Court, to consist of Joseph B. Cheshire of Raleigh, L. T. Hartsell of Concord and R. W. Herring of Fayetteville, for investigation, report and recommendation.

Approved 10 January, 1934.

BROGDEN, J., *for the Court.*

CERTIFICATE OF ORGANIZATION

OF

THE NORTH CAROLINA STATE BAR

At a meeting of the Council of The North Carolina State Bar held in the city of Raleigh and in the court room of the Supreme Court on the 6th day of October, 1933, the following Councillors were present and qualified:

Junius D. Grimes, *First District*........Washington, N. C.
K. D. Battle, *Second District*........Rocky Mount, N. C.
Ed. S. Abell, *Fourth District*........Smithfield, N. C.
Albion Dunn, *Fifth District*........Greenville, N. C.
F. E. Wallace, *Sixth District*........Kinston, N. C.
Jos. B. Cheshire, Jr., *Seventh District*........Raleigh, N. C.
Louis J. Poisson, *Eighth District*........Wilmington, N. C.
Dickson McLean, *Ninth District*........Lumberton, N. C.
R. P. Reade, *Tenth District*........Durham, N. C.
G. H. Hastings, *Eleventh District*........Winston-Salem, N. C.
Chas. A. Hines, *Twelfth District*........Greensboro, N. C.
B. M. Covington, *Thirteenth District*........Wadesboro, N. C.
C. D. Taliaferro, *Fourteenth District*........Charlotte, N. C.
Walter C. Feimster, *Sixteenth District*........Newton, N. C.
A. Turner Grant, *Seventeenth District*........Mocksville, N. C.
J. E. Shipman, *Eighteenth District*........Hendersonville, N. C.
Julius Martin, II, *Nineteenth District*........Asheville, N. C.
S. W. Black, *Twentieth District*........Bryson City, N. C.

The following elected Councillor was present but failed to qualify:

Geo. C. Greene, *Third District*........Weldon, N. C.

The following Councillor has been elected but has not qualified:

Hayden Clement, *Fifteenth District*........Salisbury, N. C.

The following officers were elected by the Council:

I. M. Bailey, *President*........Raleigh, N. C.
Julius C. Smith, *Vice-President*........Greensboro, N. C.
Henry M. London, *Secretary-Treasurer*........Raleigh, N. C.

The following were elected members of the Board of Law Examiners:

For Three-Year Term

L. R. Varser........Lumberton, N. C.
H. G. Hedrick........Durham, N. C.

FOR TWO-YEAR TERM

J. G. MERRIMON	Asheville, N. C.
GEORGE B. GREENE	Kinston, N. C.

FOR ONE-YEAR TERM

CHARLES W. TILLETT, JR.	Charlotte, N. C.
BEN T. WARD	Greensboro, N. C.

The following rules and regulations for The North Carolina State Bar were adopted:

RULES AND REGULATIONS FOR THE NORTH CAROLINA STATE BAR.

ARTICLE I.

FUNCTIONS.

SECTION 1. *Purpose.* The North Carolina State Bar shall foster the following purposes, namely:

To cultivate and advance the science of jurisprudence;

To promote reform in the law and in judicial procedure;

To facilitate the administration of justice;

To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;

To encourage higher and better education for membership in the profession;

To promote a spirit of cordiality and brotherhood among the members of the bar; and

To perform all duties imposed by law.

SECTION 2. *Division of Work.* To facilitate the work for the accomplishment of the above enumerated purposes, the Council may, from time to time, classify such work under appropriate sections and committees of The North Carolina State Bar.

SECTION 3. *Coöperation With Local Bar Association Committees.* The sections and committees so appointed may secure the coöperation of like sections and committees of The North Carolina Bar Association and all local Bar Associations of the State.

SECTION 4. *Organization of Local Bar Associations.* The Council shall encourage and foster the organization of local Bar Associations.

SECTION 5. *Annual Program.* The Council shall provide a suitable program for each annual meeting of The North Carolina State Bar.

SECTION 6. *Reports Made to Annual Meeting.* The reports of the several sections and committees, with their recommendations, shall be delivered to the Secretary of The North Carolina State Bar at least thirty days before the annual meeting. Such reports, together with any reports from special committees that the Council desires to present to the annual meeting, may be printed and sent to each member of The North Carolina State Bar at least twenty days before such meeting. Nothing herein shall preclude any section, committee or the Council from presenting a report or recommendation that has not been so printed and mailed.

ARTICLE II.

MEMBERSHIP—ANNUAL MEMBERSHIP FEES.

SECTION 1. *Register of Members.* The Secretary-Treasurer shall keep a register for the enrollment of members of The North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the Council may from time to time require.

Every member shall register by signing a registration card, which in substance shall require, until the future order of the Council, the member to furnish the following information:

1. Name and address.
2. Date.
3. Date passed examination to practice in North Carolina.
4. Date and place sworn in as an attorney.
5. Date and place of birth. If not born in the United States, when and where naturalized.
6. Whether admitted to United States District Court, United States Circuit Court of Appeals, or United States Supreme Court.
7. Membership, if any, in bar associations, giving name of each.
8. Whether suspended or disbarred, and if so, when and where, and when readmitted.

SECTION 2. *Annual Membership Fees, When Due.* The annual membership fee for an active member shall be $3.00.

Said membership fee shall be paid to the Secretary-Treasurer for the year 1933 on or before the 1st day of January, 1934, and for the year 1934, on or before the 1st day of July, 1934, and on or before the 1st day of July, of each year thereafter.

No part of said membership fees shall be apportioned to fractional parts of the year, and no part of the membership fees shall be rebated by reason of death, resignation, suspension or disbarment.

Written notice of failure to pay annual membership fees shall be sent to a member at his last known business address by registered mail by the Secretary of the State Bar. Upon payment of delinquent fees by any member, his name shall be certified to the clerk of the Superior Court of the county of his residence.

ARTICLE III.

SECTION 1. *Election of Officers.* The officers of The North Carolina State Bar, in addition to the Councillors, shall consist of a President, Vice-President and Secretary-Treasurer. The Secretary-Treasurer shall receive a salary fixed by the Council; other officers shall serve without compensation, except per diem allowance fixed by the statute.

The first President and Vice-President shall be elected by the Councillors from the active members of The North Carolina State Bar.

At each annual meeting of The North Carolina State Bar the active members present shall elect a President and a Vice-President who shall hold office until their successors are elected and qualified. The Secretary-Treasurer shall be elected by the Council annually. No officer elected by the Council or by The North Carolina State Bar need be a member of the Council. All such officers shall be the officers of the Council with the same titles.

ARTICLE IV.

DUTIES OF OFFICERS.

SECTION 1. *Absence or Inability of President.* In the absence or inability of the President at any meeting of The North Carolina State Bar or the Council, the Vice-President shall act in his place. In the event neither is present, the Council shall select one of its members to preside during such meeting.

In all other matters, if the President absents himself from the State, or for any reason is unable to perform his duties as President, the Vice-President shall perform the duties of President. In the event of the inability of either to perform the duties of President, the Council may select one of their members to act until such absence or inability is removed.

SECTION 2. *Duties of Secretary-Treasurer.* The Secretary-Treasurer shall attend all meetings of the Council and of The North Carolina State Bar, and shall record the proceedings of all such meetings. He shall, with the President or Vice-President, execute all contracts ordered by the Council. He shall have custody of the seal of The North Carolina State Bar, and shall affix it to all documents executed on behalf of the Council or certified as emanating from the Council. He shall take charge of all funds paid into The North Carolina State Bar and deposit them in some bank selected by the Council; he shall cause books of accounts to be kept, which shall be the property of The North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of The North Carolina State Bar during usual business hours. At each annual meeting of The North Carolina State Bar, the Secretary-Treasurer shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of The North Carolina State Bar. The books of account shall be audited prior to each annual meeting of The North Carolina State Bar. He shall perform such other duties as may be imposed upon him, and shall give bond for the faithful performance of his duties in an amount to be fixed by the Council with surety to be approved by the Council.

ARTICLE V.

MEETINGS OF THE NORTH CAROLINA STATE BAR.

SECTION 1. *Annual Meetings.* The time for the holding of the annual meetings of The North Carolina State Bar shall be the first Thursday after the last Monday in June of each year, at any place in North Carolina. The place shall be determined by an order of the Council or its Executive Committee, at least thirty days prior to the date of such annual meeting.

SECTION 2. *Special Meetings.* Special meetings of The North Carolina State Bar may be called upon thirty days' notice, as follows:

(a) By the Secretary, upon direction of the Council.

(b) By the Secretary, upon the call addressed to the Council, of not less than twenty-five per cent of the active members of The North Carolina State Bar.

At special meetings no subjects shall be dealt with other than those specified in the notice.

SECTION 3. *Notice of Meetings.* Notice of all meetings shall be given by publication in such newspapers of general circulation as the Council may select, or, in the discretion of the Council, by mailing notice to the Secretary of the several district bars or to the individual active members of The North Carolina State Bar.

SECTION 4. *Quorum.* At all annual and special meetings of The North Carolina State Bar, ten per cent of the active members of The North Carolina State Bar shall constitute a quorum, but there shall be no voting by proxy.

SECTION 5. *Parliamentary Rules.* Proceedings at any meeting of The North Carolina State Bar shall be governed by "Roberts' Rules of Order."

ARTICLE VI.

MEETINGS OF THE COUNCIL.

SECTION 1. *Regular Meetings.* Regular meetings of the Council shall be held on the first Friday after the second Monday in each of the months of January, April and October, in the city of Raleigh; and on the day before the annual meeting of The North Carolina State Bar, in the place of such meeting. The hour of meeting shall in each case be at 10 o'clock a.m. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

SECTION 2. *Special Meetings.* The President in his discretion may call special meetings of the Council. Upon written request of eight Councillors, filed with the Secretary-Treasurer requesting the President to call a special meeting of the Council, the Secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than ten days from the date of such call.

SECTION 3. *Notice of Called Special Meetings.* Notice of called special meetings shall be signed by the Secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting. Such notice must be given to each Councillor unless waived by him. A written waiver signed by any Councillor shall be equivalent to notice as herein provided. Notice to Councillors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States mail in the usual course, addressed to each of said Councillors at his law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States post office at least five days, before the day fixed for the special meeting.

SECTION 4. *Quorum at Meeting of Council.* At meetings of the Council the presence of ten Councillors shall constitute a quorum.

SECTION 5. *Standing Committees of the Council.* The standing committees of the Council shall consist of:

a. An Executive Committee of five Councillors, elected by the Council, and the President and Secretary-Treasurer.

It shall be the duty of the Executive Committee to perform such duties as the Council shall designate, including, however, the auditing of the books and records of the Secretary-Treasurer at each regular meeting of the Council.

b. Committee on Legal Ethics and Professional Conduct of five Councillors elected by the Council.

It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study canons of ethics and professional conduct and make such recommendations from time to time to the Council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the canons of ethics and rules of professional conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the canons of ethics and rules of professional conduct as it may be requested to perform by the Council of The North Carolina State Bar.

c. Committee on Grievances of five Councillors elected by the Council.

It shall be the duty of the Committee on Grievances to investigate and study all complaints which may be made against members of the State Bar and recommend to the Council what action should be taken on each complaint. Its recommendation shall be in writing and if the action recommended be other than dismissal of the complaint, it shall state fully all facts and circumstances which have come to its attention in connection with the complaint. If the recommendation of the Grievance Committee is for dismissal of the charges the report shall be private. It shall not be necessary to examine witnesses, but the committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

Each Councillor and the Secretary-Treasurer shall render such assistance to the Grievance Committee by way of investigations and otherwise as the committee may request.

d. Committee on Legislation and Law Reform of five Councillors elected by the Council.

It shall be the duty of the Committee on Legislation and Law Reform to examine proposed changes in the law; to examine and propose changes in the law and judicial procedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the Council or The North Carolina State Bar.

The Committee on Legislation and Law Reform shall not appear before committees of the Legislature, except upon the approval of the Council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the Council.

ARTICLE VII.

OFFICE OF THE NORTH CAROLINA STATE BAR.

SECTION 1. *Office.* Until otherwise ordered by the Council, the office of The North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the Council.

ARTICLE VIII.

BOARD OF LAW EXAMINERS.

SECTION 1. *Election.* At the first meeting of the Council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The Council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected and such members shall serve for a term of three years, or until their successors are elected and qualified.

No member of the Council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the Council.

SECTION 2. *Examination of Applicants for License.* All applicants for admission to the bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that Board.

SECTION 3. *Admission to Practice.* Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

SECTION 4. *Approval of Rules and Regulations of Board of Law Examiners.* The Council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the Council shall be the subject of further study and action, and for the purpose of study, the Council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the Council.

ARTICLE IX.

DISCIPLINE AND DISBARMENT OF ATTORNEYS.

SECTION 1. Upon the receipt of the report of the Grievance Committee, and its recommendations, the Council will determine at a regular meeting, its course in reference to the matters recommended by the Grievance Committee and shall adopt, modify, reject, or remand the said report to the Grievance Committee for further investigation, but no judgment shall be entered against any accused attorney except after a hearing has been had thereon, as provided in chapter 210, Public Laws, 1933, and herein.

SECTION 2. In case the Council decides to direct a hearing upon the matters, or any of them, so reported by the Grievance Committee, the following procedure shall be followed:

(a) A written statement, in separate paragraphs, shall be formulated by the Council, or under its directions, showing the nature and substance of all the charges preferred against the party against whom the same have been filed, or lodged. Such statement shall also contain a notice of the time and place for a hearing thereon, in the county where the respondent resides, and the respondent shall be entitled to receive two copies of said statement and notice, at least thirty days prior to the time designated for such hearing. Service of said statement and notice shall be made by the sheriff of the county in which said respondent resides, by delivering to the said respondent two copies of said statement and notice, and the Secretary of the Council shall pay to such sheriff for such service such fees as are allowed such sheriff for service of summons in civil actions.

(b) The Council shall name and designate a committee of three Councillors who shall sit at such hearing and preside over the proceedings had thereat, and remove the hearing as provided in chapter 210, Public Laws, 1933.

(c) The respondent, within said period of thirty days, may file answer to the charges set out in the said statement and notice, which shall be accompanied by two copies thereof, and the said answer and copies thereof shall, within said period, be filed in the office of the Secretary of the Council. The respondent may elect not to answer the same, and his failure to answer shall be treated as a general denial of the matters specified in said statement and notice.

(d) At such hearing, and throughout the pendency of such charges, the respondent shall be entitled to counsel; to have process to secure and compel the attendance of witnesses, the production of papers and books, documents and, upon request, the same shall be issued as prescribed in chapter 210, Public Laws, 1933. All process officers in the State of North Carolina shall be required to serve the same, and for such service shall receive fees allowed in their respective jurisdictions for the service of subpœnas issued by the Superior Courts.

(e) At said hearing, or hearings, a complete stenographic report of all testimony shall be had and the original and one copy of said testimony shall be filed with the Secretary of the Council and a copy of the same shall be delivered to the respondent.

(f) The cost of stenographic services for such trial shall be paid by the Council upon bills rendered and approved as other expenses of the Council, and shall be taxed as a part of the costs, as provided in chapter 210, Public Laws, 1933.

(g) At said hearing, or hearings, before said committee, respondent shall have the right to produce in his behalf all competent evidence and to testify in person in respect to the matters and things set out in said statement and notice.

(h) Counsel shall have the right to submit oral argument and written briefs under the direction of the said committee, and to present such arguments as may now be presented in the trial of civil actions in the Superior Court.

(i) After hearing all the evidence and considering the same, the said committee shall file its report, stating its findings of fact and making its conclusions thereon as to discipline or disbarment, or as to the innocence of the respondent. Said report in duplicate shall be filed with the Secretary of the Council and shall stand for hearing at the next regular meeting of the Council, but the Council shall have power to continue the hearing to specified dates.

(j) When the said committee shall formulate its report, a copy thereof shall be sent by registered mail, to the respondent, and the said respondent shall file his exceptions thereto within ten days from the receipt of the copy of said report. If the respondent shall desire further time he may apply to the President of The North Carolina State Bar for an extension of time in which to file exceptions to said report. The President of The North Carolina State Bar, is hereby authorized to grant such extension as will meet the ends of justice, having due regard to the right of the respondent to have a full and ample opportunity to present his defense and that it is to the interest of the public that such matters be speedily concluded. The respondent shall file his exceptions within the time herein provided or within the said extended time.

If the respondent shall fail to file any exceptions to said report, then the Council will proceed thereon *ex parte*.

(k) Said Council shall consider said report at a regular meeting and shall determine upon the record of the said hearing, which shall consist of the said statement and notice served on the respondent, his answer, if any, the testimony taken by the said committee, its report, recommendations, and the briefs of counsel filed before said committee, if any, and when the same is considered by the Council, the said respondent shall be entitled to be heard by the Council in person or through counsel, before determination, but no testimony or evidence will be taken by the Council and none heard other than such as is contained in the record filed by the committee which conducted the hearings.

(l) Any evidence, discovered after the report of the committee hearing the matter has been filed with the Council, may be the subject of a motion before the Council at any time before final judgment to remand the said report to the committee, to the end that the said committee may hear said newly discovered evidence. Such motion, and the proof with respect thereto, shall be made and heard under the rules now applicable to motions for new trials in the Superior Court for newly discovered evidence in civil actions, and if the said report is remanded to said committee to hear said newly discovered evidence, then the same shall be heard by said committee, subject to its competency, and such other evidence as may be corroborative or contradictory thereof, may also be submitted, and the said committee shall include said newly discovered evidence in its report and shall make such further findings and recommendations as it may deem proper in the light of all the evidence. Notice of such motion shall be given to opposing counsel at least ten days before said motion is to be heard.

(m) Upon such record, after hearing the argument thereon, the Council shall render its judgment as authorized in chapter 210, Public Laws, 1933, and amendments thereto, at a regular meeting, notice of which meeting shall be given the respondent, who shall have the right to be present in person or through counsel.

(n) From any judgment of suspension from the practice, or disbarment, the said respondent may appeal, as provided in chapter 210, Public Laws, 1933, and notice of such appeal shall be sufficiently given the said Council, if given orally, when said judgment is rendered at a meeting of said Council, or by service of written notice of the same on the Secretary-Treasurer thereof, within fifteen days from the rendition of said judgment by said Council, which fifteen days shall begin to run from the final adjournment of the meeting of said Council at which said judgment was rendered. A copy of said judgment duly certified by the Secretary-Treasurer shall be forthwith mailed to the respondent by registered letter, with return receipt requested.

(o) The record on appeal to the Superior Court shall consist of the statement and notice and answer, if any, and the transcript of the evidence, and the findings of fact and recommendations of the committee, and the findings and conclusions of the Council thereon, as well as the exceptions, if any, filed to the report of said committee by the respondent, and the judgment of the Council thereon and the assignments of error therein, as contended for by the respondent.

(p) The Secretary-Treasurer shall certify the evidence in question-and-answer form as taken at the hearing, to the Superior Court, on appeal, which appeal shall be sent to the judge designated in chapter 210, Public Laws, 1933, to wit, the judge holding the courts in the district including the county of the residence of the respondent.

(q) Whenever charges shall have been preferred against any member of the Bar, and the Council shall have directed a hearing upon the charges, it shall also designate a member or members of the Bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the Superior and Supreme Courts. The Council may allow the counsel performing such services such compensation as it may deem proper.

(r) In the case of persons charged with an offense cognizable by the Council, or any committee thereof, a complete record of the proceedings and evidence taken before the Council or any committee thereof shall be made and preserved in the office of the Secretary-Treasurer and the Secretary-Treasurer shall see that such record is had and preserved according to the orders of the Council.

The Council may, upon sufficient cause shown, and with the consent of the person charged, cause the said record to be expunged and destroyed.

(s) Final judgment of suspension from the practice or disbarment by the Council shall be certified by the Secretary-Treasurer to the Superior Court of the county wherein the respondent resides, and also to the Supreme Court of North Carolina. If the judgment of the Council shall be that the respondent be privately reprimanded, the Council shall formulate the reprimand and shall appoint one of its members to read and deliver the same and shall name the time and place for delivery thereof. The Secretary shall spread upon his minutes as a final judgment of the Council, the order of private reprimand, the name of the member of the Council to deliver the same, and the time and place therefor.

(t) Whenever any attorney has been deprived of his license under the provisions of chapter 210, Public Laws, 1933, and amendments thereto, the Council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration.

(u) Due notice of motion before said Council to restore such license shall, in so far as it relates to the Council, be had by serving a written notice upon the Secretary-Treasurer of the Council by delivery of two copies thereof, at least ten days prior to the hearing on said motion. In lieu of service the said Secretary-Treasurer may, in his discretion, accept service of said notice.

(v) All hearings to restore licenses shall be had by the Council which shall make its findings and declare its conclusions thereon and enter its judgment upon the same. If, as result of said hearing, the Council decides to restore said license, a copy of its judgment restoring the same shall be certified to the Superior Court of the county wherein the said licentiate resides, and if he then resides in a county other than the county where the judgment disbarring said licentiate has been recorded, then a copy shall also be certified to the Superior Court in said county where said judgment of disbarment has been recorded, and a certified copy thereof shall be delivered to the Supreme Court, to the end that the same may be recorded in its minutes, and when so recorded the judgment of the Council restoring said license shall have full force and effect throughout the State.

(w) The cost of any proceedings for the restoration of license shall be paid by the person making application therefor.

SECTION 3. All hearings on any complaint before the committee appointed by the Council to hear the same, shall be public, and if possible, shall be held in the courthouse.

ARTICLE X.

CANONS OF ETHICS AND RULES OF PROFESSIONAL CONDUCT.

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

THE DUTY OF THE LAWYER TO THE COURTS.

SECTION 1. It is the duty of the lawyer to maintain toward the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper grounds for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

THE SELECTION OF JUDGES.

SECTION 2. It is the duty of the Bar to endeavor to prevent political situations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or selection of those who are unsuitable for the bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office, and not by a desire for the distinction the position may bring to themselves.

ATTEMPTS TO EXERT PERSONAL INFLUENCE ON THE COURTS.

SECTION 3. Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relation of the parties, subject both the judge and the lawyer to misconstructions of motive, and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the judge's station, is the only proper foundation for cordial personal and official relations between the bench and bar.

WHEN COUNSEL FOR AN INDIGENT PRISONER.

SECTION 4. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

THE DEFENSE OR PROSECUTION OF THOSE ACCUSED OF CRIME.

SECTION 5. It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

ADVERSE INFLUENCES AND CONFLICTING INTERESTS.

SECTION 6. It is the duty of the lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client, requires him to oppose. The obligation to represent the client with undivided fidelity, and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed.

PROFESSIONAL COLLEAGUES AND CONFLICTS OF OPINION.

SECTION 7. A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matters should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first obtained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interests of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted, unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to coöperate effectively. In this event, it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer are unworthy of those who should be brethren at the bar; but, nevertheless, it is the right of the lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

ADVISING UPON THE MERITS OF A CLIENT'S CAUSE.

SECTION 8. A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or complicated litigation. The miscarriage to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of jurors and errors of courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

NEGOTIATIONS WITH OPPOSITE PARTY.

SECTION 9. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

ACQUIRING INTEREST IN LITIGATION.

SECTION 10. The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

DEALING WITH TRUST PROPERTY.

SECTION 11. Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

FIXING THE AMOUNT OF THE FEE.

SECTION 12. In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which under value them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable request of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider (1) the time and labor required, the novelty and difficulty of the question involved, and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction and in which there is a reasonable expectation that otherwise he should be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice, and not a mere money-getting trade.

CONTINGENT FEES.

SECTION 13. Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges.

SUING A CLIENT FOR A FEE.

SECTION 14. Controversies with clients concerning compensation are to be avoided by the lawyers so far as shall be compatible with self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition, or fraud.

HOW FAR A LAWYER MAY GO IN SUPPORTING A CLIENT'S CAUSE.

SECTION 15. Nothing operates more certainly to create or foster popular prejudice against lawyers as a class and to deprive the profession of that full measure of public opinion and confidence which belongs to the proper discharge of its duties than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every remedy or defense. But it is steadfastly borne in mind that the great trust of the law is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

RESTRAINING CLIENTS FROM IMPROPRIETIES.

SECTION 16. A lawyer should use his best efforts to restrain and to prevent his client from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct toward courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

ILL-FEELING AND PERSONALITIES BETWEEN ADVOCATES.

SECTION 17. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward the suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

TREATMENT OF WITNESSES AND LITIGANTS.

SECTION 18. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what a client would say if speaking in his own behalf.

APPEARANCE OF A LAWYER AS WITNESS FOR HIS CLIENT.

SECTION 19. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

NEWSPAPER DISCUSSION OF PENDING LITIGATION.

SECTION 20. Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymous. An *ex parte* reference to the facts should not go beyond the quotation from the records and papers on file in the court, but even in extreme cases it is better to avoid any *ex parte* statement.

PUNCTUALITY AND EXPEDITION.

SECTION 21. It is the duty of the lawyer not only to his client, but also to the courts and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

CANDOR AND FAIRNESS.

SECTION 22. The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook, or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and the presentation of causes.

A lawyer should not offer evidence which he knows the court would reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

ATTITUDE TOWARD JURY.

SECTION 23. All attempts to curry favor with the juries by fawning, flattery or pretended solicitude for their personal comfort, are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

RIGHT OF LAWYERS TO CONTROL THE INCIDENTS OF THE TRIAL.

SECTION 24. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

TAKING TECHNICAL ADVANTAGE OF OPPOSITE COUNSEL; AGREEMENTS WITH HIM.

SECTION 25. A lawyer should not ignore known customs or practice of the Bar or a particular court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by the rules of the court.

PROFESSIONAL ADVOCACY OTHER THAN BEFORE COURTS.

SECTION 26. A lawyer openly and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the courts, but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

ADVERTISING, DIRECT OR INDIRECT.

SECTION 27. The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometime of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relation, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS.

SECTION 28. It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those who with claims for personal injury or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, so to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick, and the injured, the ignorant or others to seek his professional service. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof, to the end that the offender may be disbarred.

UPHOLDING THE HONOR OF THE PROFESSION.

SECTION 29. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and maintain the dignity of the profession and to improve not only the law, but the administration of justice.

JUSTIFIABLE AND UNJUSTIFIABLE LITIGATION.

SECTION 30. The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or work oppression or wrong. But otherwise, it is his right, and having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

RESPONSIBILITY FOR LITIGATION.

SECTION 31. No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defense, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

THE LAWYER'S DUTY IN ITS LAST ANALYSIS.

SECTION 32. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose minister he is, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interest of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

ARTICLE XI.

FILING PAPERS WITH AND SERVING THE NORTH CAROLINA STATE BAR.

SECTION 1. *When Papers are Filed Under These Rules and Regulations.* Whenever in these rules and regulations there is a requirement that petitions, notices or other documents be filed with or served on The North Carolina State Bar, or the Council, the same shall be filed with or served on the Secretary of The North Carolina State Bar.

ARTICLE XII.

SECTION 1. *Seal.* The North Carolina State Bar shall have a seal round in shape and having the words and figures, "THE NORTH CAROLINA STATE BAR—JULY 1, 1933," with the word "SEAL" in the center. The seal shall remain in the custody of the Secretary-Treasurer at the office of The North Carolina State Bar, unless otherwise ordered by the Council.

North Carolina—Wake County.

I, Henry M. London, having been duly elected Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing pages constitute the Certificate of Organization of The North Carolina State Bar.

Given under my hand and the seal of The North Carolina State Bar, this the 14th day of October, 1933, Raleigh, N. C.

HENRY M. LONDON,
(SEAL.) *Secretary-Treasurer, The North Carolina State Bar.*

After examining the foregoing certificate of organization of The North Carolina State Bar, it is my opinion that the said certificate complies with a permissible interpretation of chapter 210, Public Laws, 1933. This the 17th day of October, 1933.

W. P. STACY, *Chief Justice.*

Upon the foregoing certificate of the *Chief Justice,* it is ordered that the certificate of organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the act incorporating The State Bar. This the 18th day of October, 1933.

W. J. BROGDEN, *For the Court.*

ADDRESS

BY JOHN A. LIVINGSTONE

ON

PRESENTATION OF A PORTRAIT

OF THE LATE

RISDEN TYLER BENNETT

TO THE

SUPREME COURT OF NORTH CAROLINA

BY HIS FAMILY

22 NOVEMBER, 1933

INTRODUCTION

H. H. McLendon, of Wadesboro, N. C.

May it please the Court:

As president of the Anson County bar, I desire to move the Court to suspend its regular business for a few moments, at the request of the family of the late Risden Tyler Bennett, a distinguished lawyer of our county, in order that his portrait may be presented to the State. It is a great pleasure for me to make this motion, not only for the reason that he was my personal friend for many years, but also for the greater reason that I believe North Carolina has produced no more loyal and patriotic son than he.

Colonel Bennett was not only a great and learned lawyer; he was also a brave and gallant soldier of the South, a judge who held the scales of justice evenly balanced, a statesman who reflected honor and credit upon our State. He was extremely courteous to the court at all times, and considerate in his dealings with other lawyers, particularly the younger members of the profession. He was especially kind to me. When I was sworn in he extended his hand and in his own inimitable, humorous manner said, "My son, I welcome you to the brotherhood of paupers." That his description was correct can be attested by the brethren here present.

His was an original and remarkable personality. No one who ever met him forgot him. Possessed of a marvelous voice, he was an orator without an equal, moving his audience to laughter or tears at will. Dramatic at all times, his hearers were held spellbound as he presented his cause to the court, the jury or the public.

He was a partner of the late *Judge Thomas S. Ashe* who later became a distinguished member of this Court, and whose granddaughter it was my good fortune to marry. This firm had an extensive practice in the Pee Dee section, appearing in all the important cases with rare success.

The recipient of many honors he preferred to be called "Colonel," the title he won for courage, bravery, daring and military ability displayed at an early age during the struggle between the states.

It is my privilege to present to the Court a native of Anson of whom we are justly proud; in the face of many hardships and handicaps, he has acquired fame for himself and has done honor to his county, John A. Livingstone.

PRESENTATION

It is an honor to have the privilege on behalf of the family of the late Risden Tyler Bennett to present to the Supreme Court a portrait to replace a lithograph of him presented in 1918 by his lifelong friend, the late *Chief Justice Walter Clark*. As a boy and young man I knew *Judge Bennett* in Wadesboro, and the great interest he always manifested in me is one of the inspiring memories of my life. He had then been long retired from the public stage, which had known him as a Confederate officer of distinction, a legislator of unusual capacity and a Superior Court judge of fine ability; but his interest in life and its affairs never abated. No person was too young, no one too humble or obscure, to escape his attention or to attract his friendly and sincere interest.

He was noted for his politeness. It was not affected, but was the natural manifestation of a man of broad and tolerant mind, who took a keen personal interest in every person he met. He allowed no man to excel him in politeness, no matter what his race, class or position. He took off his hat to the humblest man, not in an attitude of servility but in response to the expression of respect always manifested for his striking personality and dignity of manner. He bowed his knee to no man nor stooped to the level of any, but met all in a spirit of consideration and respect. In him was the spirit of a gentleman unafraid.

No one who met him could forget him. He was an individualist; and as he said of his friend, Eli Hildreth, "they broke the die in moulding him." There was nobody else like him. He was *sui generis*. He was stamped with the attributes of genius at his birth, with its grandeur and its weaknesses, its inequalities and its eccentricities. He always left a vivid impression in whatever station he occupied or in whatever gathering he found himself. He was dramatic to a marked degree and in another environment he might have been a Booth, thrilling the multitudes with his histrionic art. He had a terse style, a style peculiar to himself, and in another age, he might have been a Carlyle, writing observations which would have made him a towering figure in literature. But fate decreed that he was to be known as a Patriot, faithful unto death to home and kindred.

He was distinguished from his fellows by a supreme intelligence and by a zest for living. His originality reminds us of another distinguished North Carolinian, Zebulon Vance; but *Judge Bennett* was ever himself. All his life he was a diligent student both of books and of men, a lover of Nature, and interested in everything that went on about him. Only a short time before his death, he told a friend: "I seek knowledge not for selfish considerations but for the whole orb of the universe, and there is not a moment of my life when the machinery of my intellect is not in motion."

Judge Bennett was the incarnation of the spirit of the Renaissance, so well described by Walter Pater, in these striking words: "Every moment some form grows perfect in hand or face; some tone on the hills or the sea is choicer than the rest; some mood of passion or insight or intellectual excitement is irresistibly real and attractive to us—for that moment only. Not the fruit of experience, but experience itself, is the end. . . . To burn always with this hard, gemlike flame, to maintain this ecstacy, is success in life."

Living in an age when misfortune and tragedy tended to cause his fellows to seek escape from the realities in fancy and refuge in legend, *Judge Bennett* steadfastly faced the realities, his intelligence permitting no other course to him, but he was no materialist. He understood full well that life is more than meat, and that the spiritual is more real than the material. His personality inevitably made him a leader, but his leadership was founded upon the eternal verities and his life was marked by adherence to basic principles. He was a true realist, who looked beyond the circumstance of time and place to the cycle of the centuries and beyond the changing scenes of a material world to "a building of God, a house not made with hands, eternal in the heavens."

For one of his profound spiritual insight and his great intellect to have been thrust into bloody war in defense of his homeland just as he had reached manhood, and then to have suffered defeat, was a blow from which he never recovered; but it is to his glory that he carried on bravely for nearly a half century, serving well his generation. The memory of the subjugation of his people brought into his life a note of melancholy. The words of the 137th Psalm, describing the constancy of the Jewish people, were often in his mind:

"By the rivers of Babylon, there we sat down, yea we wept when we remembered Zion.

"We hanged our harps upon the willows in the midst thereof.

"For there they that carried us away captive required of us a song; and they that wasted us required of us mirth, saying, sing us one of the songs of Zion.

"How shall we sing the Lord's song in a strange land?

"If I forget thee, O Jerusalem, let my right hand forget her cunning."

Born in Anson County on the 18th day of June, 1840, *Judge Bennett* was the son of Nevile and Catherine Harris Bennett, their twelfth and youngest child. His great grandfather, William Bennett, migrated from Maryland to Anson County soon after its formation in 1750, and was chaplain of Wade's Minute Men, Salisbury District, Continental Army. His forefathers were sturdy farmers, avoiding public life, shunning notoriety, plain spoken, independent in thought, whose one ambition was to owe no man anything. Nevile Bennett farmed during the week and as a Primitive Baptist minister preached on Sundays. He was a diligent business man, extremely honest in his dealings, never selling corn for less than fifty cents a bushel nor for more than one dollar, had a large head, a strong brain and, although he married at the early age of 17, he improved steadily in his learning and became equal to the task of writing any legal document that his business dealings required. He was a Whig in politics. *Judge Bennett's* mother was the daughter of Rev. Archibald Harris, son of Sherwood Harris, a Revolutionary soldier, who was a son of Sherwood Harris, a Colonial Officer, Granville District. He was a Baptist minister, and was born in Wake County. She is described as having been a woman of unusual beauty, of unbounded energy and of strong intellect, who inspired in her son a devotion to herself and an admiration of her character which remained with him throughout his life. His father died when he was only 12 years old, leaving him to the care of his mother.

Judge Bennett's early life was spent on his father's plantation, and his natural intelligence prompted his father to impress upon the mind of his son a desire to strive for the honors of the law. Apart from the paternal admonition, there was within him a strong latent ambition which manifested itself in his inclination to test his strength against that of any boy of his age. His childhood was devoid of care, his earliest recollection being of riding on the neck of his Negro nurse, Peter, with whom he said in later days that "there was perpetual sunshine and concord."

His early education was described by *Judge Bennett* as a sort of "shadow in the mist." He could not recall when he did not know the alphabet. He attended Gouldsfork Academy near Wadesboro and Anson Institute in Wadesboro, and when 16 years old was ready for the sophomore class at the University of North Carolina. His early education was the natural development of a strong, vigorous and growing boy, and if rather haphazard, developed a towering personality. Hazing was a common practice in the colleges of those days, as well as for many years later, but the self-reliant youth from Anson County would not submit to such indignities without rebellion and it was in accordance with his independent nature that he left the University soon after enrollment, registering his protest in a way that could leave no doubt of his stern disapproval.

The Wanderlust was strong in him, as it usually is in boys of 17, and he set out for the West. He was always reticent as to his adventures, but his daughters in later life learned from him that he saw the Rocky Mountains, lived with Indians, went to a funeral on a mountain road where they "lost the corpse and had to go back three miles and find it; everybody drunk but me and the corpse." He was carried away with Kansas City, then in its early development, and liked to recall that he saw "twelve yoke of oxen run away and swim the Missouri River." He wrote his guardian, George W. Little, to sell everything he had and come West, promising him that he could get rich by buying lots in the growing town. The old gentleman replied by sending him enough money to come home on. Useless to speculate on what might have happened had he been permitted to settle in the mid-West, for one cannot think of *Judge Bennett* apart from his native environment.

Following his Western adventures, *Judge Bennett* attended Davidson College for a short time, and in the winter of 1858-9 enrolled as a law student at Cumberland University, Lebanon, Tennessee, and, joining the Delta Psi fraternity, found himself at home with a congenial company of youngsters, many of whom were shortly thereafter to find themselves fighting on opposite sides in war. After his graduation in 1859, he finished his law studies under *Chief Justice Pearson,* beginning active practice as an attorney at law in the Court of Common Pleas and Quarter Sessions in Anson County at the January Term in 1860.

Always a man of strong convictions and deeply devoted to his native State, *Judge Bennett* was naturally an advocate of State rights and an ardent secessionist. Upon the fall of Fort Sumter and the proclamation of President Lincoln calling for troops to coerce the seceding states, he was among the first to volunteer in response to the call of North Carolina for men to defend her rights and independence. He enrolled in April, 1861, as a private in the Anson Guards, which was the first company in the State to offer its services to Governor Ellis of North Carolina. Soon promoted to corporal, he received the flag, given to this company by their home county and presented by Miss Kate Shepherd, whom he married 26 August, 1863, while at home on a furlough on account of wounds at Gettysburg.

Resolute, competent and courageous, the young soldier soon won his spurs and on 5 July, 1862, when just 22 years of age, he was promoted to the colonelcy of his regiment, the famous Fourteenth North Carolina Troops, which had been trained and drilled by its first Colonel, Junius Daniel, until it had attained a high degree of efficiency. *Judge Bennett* bore his part bravely in nearly every battle fought by the Army of Northern Virginia, displaying that coolness and courage for which he was so highly distinguished. He was especially mentioned for his gallant conduct at Sharpsburg, Chancellorsville, Gettysburg, and in the campaign of 1864 from the Rapidan to Richmond. Particular mention may be made of his conduct at the "Bloody Lane" at Sharpsburg, where Anderson's Brigade, of which his regiment was a part, was so fiercely attacked by a Federal Division that it lost its commander, George B. Anderson, and Colonel Bennett and many others were wounded. *Judge Bennett,* in his history of the Fourteenth Regiment, in his own inimitable way, vividly describes this battle:

"The first great baptism of fire in our regimental experience was at Sharpsburg. Our position in the 'bloody lane' has become historical and deserves immortality. In the most exposed part of the lane, the regiment held its ground, repelling every stroke of the enemy from sunrise until late in the afternoon. It was a terrific battle. Nature was in her most peaceful mood; the autumn sun was without caprice. I watched the tide of this battle with intense interest while the combatants thundered away. The open fields to the left oblique of our regimental position were fought over and over with varying fortune. Now the flag of the Government was on the summit of a hill over which all were striving, then the tide went back and the ensign of the Confederate States was to the fore."

The most memorable day of the war to him was the 12th of May, 1864, when his regiment saved Ramseur's Brigade from imminent destruction at Spottsylvania Court House, for which he was publicly recognized in official reports. The large oak which was cut down that day by shot and shell fell within a few feet of his regiment. In his own picturesque manner, *Judge Bennett,* writing of this battle, told of a conscript soldier from Edgecombe County, who had been complaining of rheumatic pains and begging the boys never to run away from him, as being in the very forefront, without a gun, using an iron ramrod as his support and weapon and shouting to his comrades to strike home.

In these battles he was several times wounded, and he was finally captured by the forces of the Federal Government at Winchester, Virginia, and thereafter was kept a prisoner on parole until 28 February,

1864. Brigadier General William R. Cox, in his history of the Anderson-Ramseur-Cox Brigade, tells of his capture in a succinct sketch of Colonel Bennett:

"R. T. Bennett, Colonel of the Fourteenth Regiment, was of imposing presence, strong individuality, and an able commander. His voice was clear and sonorous and there was no mistaking or disobeying his commands. When I was placed in command of the brigade, he was suffering from an unhealed wound, yet he promptly returned to duty. In the battle of Winchester, after having two horses shot under him, he on foot pressed to the front, when the brigade was changing its position, to one of more effectiveness, and the movement was so rapidly executed that he, with a few others on the right, were taken prisoners."

Even in the bloody strife of war, *Judge Bennett* was unique in whatever he did. His conduct on the field of battle won for him the confidence of his superiors and the respect of the soldiers serving under him. His personality could not be submerged even by military discipline. He complied with all of the routine, but beyond that he was free to express himself. In making a report of his regiment, giving a list of the dead and the wounded, such as all colonels were required to make, he wound up with this sentence:

"These bloody accompaniments adminiculate the truthfulness of the apothegm of Burke that liberty in its last analysis is but the blood of the brave."

Returning home at the close of the war, he found that Sherman's Army, on its famous "march to the sea," had just crossed the Pee Dee River on the journey eastward and that a Federal soldier had killed his uncle, James H. Bennett, a fine citizen and original Union man, who had three sons in the Confederate armies. This tragic incident made a lasting impression upon his mind.

In common with his comrades in arms, *Judge Bennett* came out of the War Between the States with a nostalgia that no subsequent experiences could obliterate. Before there had been a Union, there were thirteen states, one of them being North Carolina, and in these states the first loyalty of citizens was to the State. The doctrine of State Rights was no mere shibboleth to justify slavery, as some historians have claimed, but was imbedded in the heart of the American Union. This doctrine was well expressed by Rawle, the Pennsylvanian, in his book on the Constitution, used as a textbook at West Point when Jefferson Davis was a student there:

"The secession of a State from the Union depends upon the will of the people of such State. The states then may wholly withdraw from the Union, but while they continue they must retain the character of representative republics."

Agriculture was the main occupation of the South, as it was of all the states at the founding of the Union. The South retained its original unchanged views but the industrial and commercial development of the North brought changed social and economic conditions while the West was settled under social, political and economic conditions that caused citizens of those states to feel that their first allegiance was to the Union.

The South, confident of the righteousness of its cause, had challenged the power of the nation in full expectation of victory. Now, after four years of bloody conflict, it faced the future with the consciousness of overwhelming defeat. Not for a half century was it to recover its faith in its destiny. Not only was there a loss of confidence, due to its crushing defeat, but there was also dire poverty for the next fifty years. Confederate soldiers, returning home, found incredible loss and wreckage. Nothing finer in the pages of history can be found than the heroism with which they set to work to mend hearts and fortunes.

For a man of the sensitive nature of *Judge Bennett,* who had felt the exaltation of victory on many battlefields, to return to the degradation and ruin which he found on every hand was even more of a Gethsemane than it would have been for a man of more mature years. The best evidence of his intelligence is the fact that in the midst of the ruins of his ideals and his fortunes, he framed for himself a philosophy and found in these experiences of defeat and frustration a religious faith that sustained him in the darkest hour, even down to old age. Forty years after, he could say to his former comrades, who with him had kept the faith: "We lost. Philosophers do not repine over the inevitable. They are content, after acting well their parts, to submit to the will of God. We are Confederates still."

In the dark days of the Reconstruction period, when the very foundation stones of government appeared to have fallen, *Judge Bennett* found a sustaining consolation in the sentiment and the language of Pericles, as expressed in his celebrated oration over the dead, who had perished in the first campaign of the Peloponnesian War, 430 years before Christ. Eulogizing the Grecian soldiers who had stopped short of success, Pericles declared that they "when at the very height of their fortune were taken away from their glory rather than their fear." *Judge Bennett* retained vivid memories of the Confederate soldiers of whom he declared that "the zeal which impelled the men of the crusades in their mission to redeem the Holy Sepulchre was not more fiery than the Divine intoxication which moved the spirit of our soldiers." Though they had fought bravely, they lost and henceforth their deeds of heroism would be only a sad memory to the living and the dead could only be eulogized, in the words of *Judge Bennett,* as having "no country except the unmarked empire of eternity; no flag except the weird cross borne at the head of the spectre host in the spirit land."

The heritage of defeat and frustration, which was to be the South's for the next half century, brought in its train a spirit of narrowness and provincialism, which found expression in the claims of the different Southern States for priority of distinction in the brave exploits of war before the Confederate states were crushed. But not to *Judge Bennett*, for he never joined in singing the praises of North Carolina by citing *Judge Walter Clark's* famous phrase: "First at Bethel, farthest to the front at Gettysburg and Chickamauga, last at Appomattox." If such were the case, *Judge Bennett* declared that it was a mere coincidence. "It is unjust to say that the soldiers of this or that state fought best," he said. "All did well, and if on any given battlefield of war, the dead of North Carolina or Virginia, or any other state fell nearest the enemy, it was the accident of fortune."

His difference of opinion with *Judge Clark* did not mar their friendship. Upon completion of the five-volume history of North Carolina regiments, in the War Between the States, which was compiled under the direction of *Judge Clark*, the latter asked *Judge Bennett* to write the dedication, declaring that nobody else in North Carolina could do it as well as he. This dedication reads:

"In the name of the more than 125,000 soldiers, living and dead, whom this State sent to the front in one of the greatest and most unequal conflicts recorded in history, these volumes, fraught with the testimony of comrades to immortal courage, are inscribed to the heroic women of North Carolina, who inspired our citizen soldiery by their faith in God, by their magic influence and immeasurable good works, and to their fair daughters, whose unshaken fidelity has preserved the fame of our Glorious Dead. With such to inspire the living and honor the fallen the men of North Carolina will ever be equal to victory—superior to defeat."

While *Judge Bennett* complied with the request of *Judge Clark* to write a history of the Fourteenth Regiment, he refused to join in supplying pictures of the officers when the sketch was printed, declaring that "no picture of any officer of the regiment now alive should go into the sketch" because the officers most conspicuous in peace and least forward in battle would be sure to take up the front pages and stir up strife if elbowed "out of their proper margin by the best men of the regiment." And if the officers, why not the privates and noncommissioned officers? "It disturbed my democratic sense of equality," he added.

Judge Bennett carried with him throughout his life a vivid recollection of the few times that he saw or met "Stonewall" Jackson, his regiment having been a member of Jackson's corps, and wrote a classic description of Jackson's ride to Chancellorsville, shortly before his untimely death. *Judge Bennett* and his men were resting on the roadside. Suddenly came "the sound of a great multitude who had raised their voices in accord. Even the heavens seemed agitated," he said, as the horse and its rider came into sight. The picture left with *Judge Bennett* was that of "the simple Presbyterian Elder, anointed of God, with clinched teeth, a very statue, who passes to his transfiguration." Great as was his admiration for Jackson, *Judge Bennett* never subscribed to the prevalent belief in the South of his day that if Jackson hadn't been killed, the Confederate armies would have won the war. "In general it is rash to say any single man has been indispensable in the accomplishment of any great end," he declared in a eulogy of Jackson describing him as a man whose "enterprise, official initiative and the mystery which enveloped his person and plans, crowned with the intense and powerful seriousness of his manner, mind and method, clothed him in public apprehension unrelentingly in earnest from first to last."

Though there was a nostalgia in his heart that would never be obliterated, a melancholy in his mind that would remain with him for life, *Judge Bennett* was too much a man of action to hesitate as to his course at the end of the War Between the States. He returned to Wadesboro and applied himself to the practice of the law. The first year he made only one hundred dollars in gold, but true to his early teachings of thrift, he saved half of it. His wife taught music and helped him as best she could. As was the case during the war when his accurate and faithful discharge of duties, his endurance and his courageous service, won for him the confidence of his superior officers and the devotion of his soldiers, so now his legal ability and force as a speaker rapidly won for him success as a lawyer. He made rapid progress in his profession and was at one time a partner of *Judge Thomas S. Ashe,* later a member of the N. C. Supreme Court. He served as solicitor for Anson County during the years of 1866 and '67. He was soon in the thick of politics, the only career then open to a man of his talents and training, and sprang to the front at once, bending all his energies to the upbuilding of the Democratic party in the State.

He was a candidate for the Constitutional Convention in 1867 under the Reconstruction acts as a Democrat, but was defeated. He was nominated for Congress in 1870, and declined on account of infirm health, but two years later he was elected to the House of Representatives of North Carolina, and was made chairman of the Judiciary Committee in that body, and Democratic leader by common consent. After serving two years, he declined reëlection. He was a member of the Constitutional Convention of North Carolina in 1875 and was chairman of the Judicial Department, reporting numerous amendments to the Constitution. At this time he was almost helpless with sciatica, but the majority being so close, he was carried to the Capitol daily, and lay on a cot, unable to sit up.

In 1880, he became a judge of the Superior Court, and wherever he went about the State, the people honored and praised him, and his former comrades in arms never ceased to press forward to touch his hand.

On 2 February, 1882, while he was holding court in Raleigh, veterans of companies E and K of the old Fourteenth Regiment presented him with an elegant gold-headed cane, which became one of his chiefest treasures. He enjoyed the rides on the circuit, but soon the call of political battle came again.

In 1882, it was necessary for North Carolina to elect a Congressman-at-large. Because of the dissatisfaction with the prohibition legislation of the previous session of the Legislature, when the question was submitted to the people of the State, and the fierce campaign in the West waged against the county government system, which deprived the people of their right to choose their county commissioners, it was extremely doubtful if the Democrats could carry the State. Party leaders feared that all the reform measures which the Democrats had been able to adopt, with a view to restoring the government of the East to the control of white leaders, was in danger of being overthrown by hostile forces. In this emergency, *Judge Bennett's* personal popularity and his political record led to his being chosen as the most likely of all the public men to stem the tide and avert the disaster. He resigned his seat on the bench, was nominated, made a brilliant canvass of the State, carried the State by a small but safe majority, and the opposition, being thus defeated, after a great contest, abandoned hopes of success in the State and for ten years after made no important effort against the domination of the Democratic party.

In the 48th Congress *Judge Bennett* served as a member of the Committee on Privileges and Elections, also on the Committee for the Election of President and Vice-President. At the next election he was nominated by his own district and was reëlected to the 49th Congress, receiving more than 19,000 votes against 14,000 for his Republican opponent. He served on the Judiciary Committee, and as chairman of the Committee on Expenditures in the State Department. In Congress, as on the Bench, in the Legislature, and on the battlefield, he carved his own career, spoke his own mind, held to his own convictions, relied upon his own judgment, and was captain of his own soul, ever mindful as he always was of the right of others to do the same. He was the leading member from North Carolina by common consent and Chairman Tucker said he was the ablest member serving on the Judiciary Committee.

He was a Democrat, but did not hesitate to vote with the minority, even if it constituted only himself and one other as was the case on 22 April, 1884, when he voted against the pension appropriation bill. There were 180 ayes and 140 not voting, but he did not dodge expressing his opposition, declaring that the expenditures for pensions in ten years would reach two hundred million dollars. He was one of seven voting "No" against exempting the building of a Young Women's Christian Association in the District of Columbia from taxation, declaring that with the country burdened with a great public debt, he could not take a stand that would impose heavier tax burdens upon other property owners. He was one of six voting against a bill to prohibit aliens from owning lands in territories of the United States, declaring that every State except Vermont had provisions in their Constitution or statutes permitting aliens to own land and adding: "Yet this great country which has accepted service of foreigners in war and in peace is afraid of the presence of these people in the territories. There is nothing more splendid in the long annals of Phariseeism." He opposed the Edmunds-Tucker anti-Mormon bill, being in the minority, on the ground that the converse of the first amendment of the Constitution is true, and that Congress had no right to make a law to disestablish a religion. His two speeches against this bill make spicy reading. They show acuteness, vigor, culture, legal acumen and ability.

He retired from Congress of his own volition, declaring that the South needed men of every social virtue, of religion and of honor in Congress, and that it must remain poor for another generation to come because of the great drain upon its resources by taxation and "by the cupidity of those who seek to get something for nothing—pay for patriotism, pretended or real." He did not again hold public office, preferring the practice of law in his own town and county to any further political honors.

He was mentioned for Governor, but ill health prevented him from giving the suggestion serious consideration. When Senator Vance died in 1894, he was mentioned for appointment as his successor.

Throughout his political career, his broad and practical mind and his decided convictions brought him unusual influence in party councils. He was through life a Jeffersonian Democrat, always an advocate of free suffrage, believing in the right of every male citizen, whether white, black or Croatan, to cast his ballot, unless he had forfeited his right by crime, again carrying his convictions to their logical extreme, and refusing to compromise his convictions by narrow or provincial conceptions.

As an orator, *Judge Bennett* was one of the most gifted men in the State. He approached genius, scintillating at times with real eloquence, sparkling with wit and humor, his arguments clear, persuasive and convincing. He was uneven and uncertain, flashing today and going out tomorrow, but when at his best, there was none in the State who could excel him. His originality, all his own, and his striking and pleasing personality, his mastery of dramatic effect, his poise and dignity, his naturalness, added to the attractions of his discourse.

As a lawyer, his habits were studious, his comprehension broad and his memory accurate. In his relations with the courts, he was the soul of courtesy, ever considerate, and his appeals to a jury were powerful and compelling.

As evidence of the high esteem in which he was held as orator, patriot and soldier of the Confederacy, he was chosen time and again by the Daughters of the Confederacy to deliver memorial addresses. Among the addresses on such occasions which stand out are: One on Brigadier General Junius Daniel before the Ladies Memorial Association, Raleigh, 10 May, 1880; one on "The Confederate Soldier" before the Ladies Memorial Association at Wilmington, 10 May, 1883; one on the occasion of the laying of the cornerstone of the Confederate monument in Raleigh, 22 May, 1894, and one on "Stonewall" Jackson in Charlotte, 10 May, 1908. He was in demand as a speaker at the annual reunions of his comrades, speaking time and again in his home town. Among his memorial addresses on such occasions was one delivered at Newton, 10 May, 1904. Some of these addresses were so highly esteemed that they were thought worthy of permanent preservation among the Southern Historical Papers, published at Richmond, Va.

In addition to his memorial addresses on various occasions, *Judge Bennett* made a large number of addresses on various subjects and his contributions to newspapers received many complimentary notices. He achieved a Statewide reputation as a writer of obituaries of departed friends and acquaintances, which were published in the *Wadesboro Messenger and Intelligencer,* and many of which were widely copied. These obituaries, like his speeches or whatever he did, had an individuality and originality all their own, and in them were expositions of his own philosophy of life and outlines of his religious faith, which he found exemplified in the lives of the men and women about him. During the later years of his life, he was the gifted biographer of Anson County, and left behind him a rich collection of sketches which give an interesting insight into the men and women whom he knew and admired.

Time does not suffice to go into detailed reference to these obituaries but among those deserving special mention is one of Rev. John W.

Davis, who was described by him as "a striking man in appearance, wearing his hair long and parted, after the fashion of Cromwell and his Ironsides; a ruddy complexion with Falerian coloring, a blend of the Puritan and Whig, with a Missionary Baptist finish." Another Anson County man whom he brought to public notice was Dan Short, "an Old-Style, Home-Made, Upright Citizen." We are told that Uncle Daniel stood by the ancient ways, particularly in the matter of the useless habit of wearing undershirts, for he "wore one shirt at a time made of cotton of his own raising, woven under his own roof in the looms, with shuttles, which taxed the patience but gladdened the hearts of our mothers and grandmothers, cut and put together and fitted by the women folks of the house." But the most surprising virtue of Uncle Daniel was his peaceful inclinations, for "he never had a law suit with neighbor or stranger or foe in any court, high or low." His further characteristics are thus minutely catalogued by *Judge Bennett:* "He was a frugal minded man. Made money by farming and saved his money; lent it at interest if the intended borrower suited him; never took unlawful interest of usance for the loan or forbearance of money. A moral man who never joined any church, but like all sensible men had his religion; a believer in our blessed Bible, honest in word and deed, through and through. He lived up to the scriptural injunction: 'Owe no man anything, except to love the brethren.' He was plain of speech; sometimes too candid in his talk to keep in friendly touch with everybody. To one desiring to borrow money, he said he had it, but it wern't doing the proponent any good. His business was his pleasure. His education was rudimentary. His economy was worthy of praise. His habits of saving were assurance against unworthy citizenship. There is much self denial mixed up and blended in an humble life which makes and saves its earnings."

None was too humble to claim *Judge Bennett's* interest and he eulogized George Crowder "ex-slave and philosopher" with the same objective impartiality as he did his other friends, making of him this striking but true observation: "The chief pleasure in life is derived from the company of our inferiors. People who are constantly screwed to the point of saying only those things which top-dressed with icing are deserving, but belong to themselves. They have little sympathy with conditions in life away below them." Of George he declared that "he was one of the most powerfulest minded colored men since Hannibal."

Among the important publications of *Judge Bennett* was his admirable contribution to the Regimental Histories of North Carolina, compiled under the direction of *Judge Clark,* mention of which has already been made, and he also worked on a history of Anson County.

In addition to his professional studies, *Judge Bennett* read widely and systematically in the realm of literature. He had an intuitive perception of the best literary works, and was careful to form his style on the basis of the best writers. Montesquieu and Renan; Shakespeare and Montaigne, De Tocqueville and Hugo, and among the novelists, Dickens, these constituted the literary diet upon which he delighted to feed, but above all he was conversant with the writings of the Apostles and the Prophets of Israel. In general it may be said that he followed in the train of the glorious company of men, who have left behind the noblest thoughts and ideas, and their effect upon his life and labors was marked.

He was a great lover of nature and the outdoors, and no day was too dark or crowded for him to fail to note the myriad colors made by the sunshine upon the blanket of earth spread out before him. Like all great spirits, he was at home in the world, in tune with the cosmic forces, and for him all was beautiful. As a boy on the farm, he had picked cotton, cut small grain, hunted rabbits, shot squirrels, and the impressions then formed never left him. In his manhood he delighted in the pastimes of fishing and quail hunting. His delight was in the joys of associations with the birds, the trees and the flowers. He usually rode horse back in going about his farm. He delighted in the forests that covered the many acres of land that he owned in the vicinity of Wadesboro, and he could not stand the thought of having them cut down. One of his last appeals to his fellow Ansonians was in behalf of the birds, which he said were the friends of the farmers. So great was his love of nature that he began his last will and testament with these words: "I yearn to express my deep sympathy with all animate nature. Hence my children and grandchildren are persuaded to keep in their integrity the haunts of birds of the air and fields, not to fell the trees of original growth but keep them as tired nature's sweet restorer. I am so devout in this that I put it in the forefront of my devotion to the universe and to my Creator."

His religious affiliations were with the Protestant Episcopal Church, but he was reared in the Primitive Baptist faith, was baptized by a Methodist chaplain during the war, and throughout his life was broad and catholic in his views. He knew as much theology as most of the ministers with whom he delighted to associate, regardless of what church they served, but there was nothing narrow or sectarian in his religious views. He had faith in God and confidence in his fellow man, and believed in striving after moral excellence with less regard for material prosperity than for exalted ideals.

In his own words, referring to another, *Judge Bennett* "stumbled upon death" after a short illness on 21 July, 1913, leaving surviving him his widow, Mrs. Kate Shepherd Bennett, their married life lacking only one month of having spanned a half century. To them were born three daughters, Mrs. Effie Nevile Leak, Mrs. Mary Bennett Little and

Mrs. Kate Shepherd Bennett, all of Wadesboro. Twin sons, born to them, died in infancy.

He was buried near Wadesboro in the Bennett family burying ground, which in his will he asked to be denominated "Magnolia Summit," and "to be kept in perfect condition—adorned with flowers." "Let the supply of rose bushes be prodigal," he admonished.

To the end he carried with him "but one great sorrow, the fall of the Confederacy." Despite this sorrow, with life's greatest adventure behind him at the age of 25, he bravely carried on for a half century, carving for himself a notable career in the political life of his State and in his chosen profession, making for himself innumerable friends of all classes and occupations, often misunderstood because his intelligence and his spiritual comprehension was broader than that of most of his fellows but always commanding their respect and esteem, never deserting or forgetting home or kindred, never desiring to escape their misfortunes. He found solace in communing with the great spirits of all time, comfort in acquaintance with Nature, and consolation in the teachings of religion. Of him it may be said, as was said of another:

"He was a man, take him all in all,
I shall not look upon his like again."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF THE LATE RISDEN TYLER BENNETT, IN THE SUPREME COURT ROOM, 22 NOVEMBER, 1933

The name of Risden Tyler Bennett is inseparably connected with the Civil Strife and Reconstruction Period of North Carolina history. He wrought nobly and heroically in his day and generation. A grateful people will ever honor and revere his name.

As he returns to us in remembrance today, we are happy to recall him as lawyer, statesman, citizen.

His associations with the courts and their officers, whether as attorney or presiding judge, were always marked with great deference and respect. His unfailing and uncommon courtesy earned for him the title, "Gentleman of the Old School"; and never did he "darkeneth counsel by words without knowledge." Job 38:2. Indeed, he was master of the unusual phrase. No one privileged to meet him could ever forget him. On one occasion he made a profound and lasting impression upon the mind of a youth, who, with his father, a Methodist minister, chanced to meet him upon the street. Tipping his hat and bowing, he introduced himself with the salutation, "Your servant, sir, *Judge Bennett.*"

A man of commanding personality, of strong convictions, of unyielding loyalty to friend and cause, he could not fail of leadership among his people. His broad and humane sympathies made him champion of the rights of the meek and the lowly, and they, in turn, never denied to him their full measure of devotion. He was the idol of the helpless, their protector and friend.

His greatest contribution was that of an outstanding citizen. He believed in the multiplication of life's satisfactions, but he also preached a gospel of right living and high thinking, for he knew that if civilization itself is to endure, it must be guided by the steadying influence of spiritual values. He dwelt much upon the vision of the mind's eye, and anchored his soul deep in the recesses of an Unseen Force. He learned his lessons in the stern realities of war.

The court is pleased to receive this excellent likeness of *Judge Bennett.* The Marshal will hang it in its appropriate place among his peers as a worthy tribute to one who served ably and well his State and its people.

The splendid appraisal of his friend and ours will be published in the forthcoming volume of the Reports.

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ACCOUNT STATED. (Limitation of action on, see Limitation of Actions B a 2.)

A Nature and Essentials.

a In General

1. Where the evidence is to the effect that the principal debtor, after examining the account between the parties, signed a statement declaring the amount due by him thereon to be in a certain sum, his signature being affixed in the presence of one of his sureties acting with the consent and approval of the other surety, and there is no allegation of fraud or mistake in the signing of the statement, the parties are bound by the signed statement admitting the amount due, and the creditor is entitled to judgment for such amount. *Portrait Co. v. Furches*, 539.

B Operation and Effect.

a Items Concluded

1. Plaintiff held entitled to recover amount due on account stated and sureties could not maintain that amount should be credited with principal's payment of sum applied by creditor to another account. *Portrait Co. v. Furches*, 539.

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ADOPTION.

B Rights and Liabilities of Parent by Adoption.

c Custody of Adopted Child

1. Where a child has been legally adopted, its parent by adoption is entitled to a decree for its custody in *habeas corpus* proceedings as against its natural mother even though it is found by the court that it would be to the best interest of the child to award its custody to its natural mother. *In re Osborne*, 716.

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ANIMALS.

B Liability of Owner for Injuries Inflicted by Animals.

a In General

1. In order to recover for an injury inflicted by a domestic animal plaintiff must show that the animal was vicious or dangerous and that the owner had knowledge, actual or constructive, of the vicious propensity of the animal, and in this action to recover damages by an employee on a farm for injuries sustained when plaintiff was gored by a bull that he was instructed to take to pasture, defendant's motion as of nonsuit was properly granted, there being no evidence that the bull had ever previously attacked any person or had given signs of viciousness, or that defendant had knowledge of any vicious

ANIMALS B a—*Continued.*

propensity in the animal, and, ***held further***, the bull's habitual bellowing and pawing of the ground when taken to pasture was not evidence of vicious propensity, such actions being normal behavior in a bull. *Banks v. Maxwell*, 233.

APPEAL AND ERROR. (In criminal cases see Criminal Law L; appeal bonds see Supersedeas.)

A Nature and Grounds of Appellate Jurisdiction of Supreme Court.

a In General

1. The Supreme Court is confined to matters of law or legal inference upon appeal of a civil action. Art. IV, sec. 8. *Misskelley v. Ins. Co.*, 496.

d Judgments and Orders Appealable. (Review of matters in discretion of court see hereunder J b.)

1. Formal judgment overruling demurrer is appealable, and lower court may not proceed in the cause pending appeal. *Griffin v. Bank*, 253.

2. No appeal lies from the refusal of the Superior Court to set aside a writ of *recordari* granted in the cause. *Stewart v. Craven*, 439.

B Preservation in Lower Court of Grounds for Review.

d Appeal

1. Where a judgment sustaining the demurrer for failure of the complaint to state a cause of action is not appealed from, the sufficiency of the complaint is not presented for review upon appeal from a subsequent order striking out an amendment to the complaint filed under leave of the judgment sustaining the demurrer. *S. v. Oil Co.*, 123.

2. Where defendant appeals from an order overruling its demurrer to plaintiff's complaint, and the Supreme Court dismisses the appeal because the question of whether plaintiff could maintain the action has become moot, and thereafter judgment is rendered in the trial court in plaintiff's favor, from which judgment defendant does not appeal, on plaintiff's appeal from that part of the judgment directing that security filed by defendant in the cause to secure the payment of any judgment plaintiff should recover should be returned to defendant receiver for application as a general asset, the only question presented on the appeal is the correctness of the order disposing of the security filed by defendant, and the question of plaintiff's right to maintain the action is not presented for review. *McCleese v. Trust Co.*, 345.

C Requisites and Proceedings for Appeal.

d Appeals in Forma Pauperis

1. An order allowing an appeal *in forma pauperis* may not be signed by the clerk more than ten days after the expiration of the term of court at which the judgment was rendered. *Cole v. Gaither*, 473.

D Effect of Appeal.

a Powers of and Proceedings in Lower Court after Appeal

1. An appeal lies as a matter of right from judgment overruling a demurrer unless the demurrer is regarded as frivolous or is treated as a motion to dismiss, and where after appeal from a formal

APPEAL AND ERROR D a—*Continued.*

judgment overruling a demurrer the trial court proceeds to hear exceptions to the report of the referee in the cause and enters judgment affirming the report of the referee, and an appeal is taken to the second judgment, the Supreme Court, upon affirming the judgment overruling the demurrer, will order the judgment confirming the report of the referee stricken out and the cause remanded for further proceeding according to law. C. S., 655. *Griffin v. Bank*, 253.

E Record Proper.

a Necessary Parts of Record

1. The pleadings, issues and judgment appealed from are necessary parts of the record proper, and where they are not contained in the record the appeal will be dismissed. *Payne v. Brown*, 785.

b Matters not Appearing of Record Deemed Correct

1. Where the charge of the court below is not in the record the charge is presumed to be without error. *Hobbs v. Kirby*, 238; *Moore v. Powell*, 636.

2. Where the evidence is not in the record and there is nothing therein to show that the charge of the court was erroneous, the charge will be presumed correct. *Midland Co. v. Glass Co.*, 763.

e Transmission and Filing of Record

1. It is the duty of appellant to see that the record is properly made up and transmitted. *Payne v. Brown*, 785.

g Conclusiveness and Effect of Record

1. The record on appeal imports verity. *Aldridge v. Dixon*, 480; *In re Foreclosure*, 488; *Midland Co. v. Glass Co.*, 763.

h Matters Presented for Review on Record

1. On appeal from a nonsuit entered on plaintiff's evidence prior to the introduction of evidence by defendant, the legal effect of the defenses set up in defendant's answer is not presented for review. *Hardware Co. v. Malpass*, 605.

2. On appeal from the sustaining of a demurrer to the complaint defenses set forth in the answer filed in the cause are not presented for review. *In re Bank*, 840.

F Exceptions and Assignments of Error.

c On Appeal from Superior Court Judgment Entered on Appeal from County Court

1. Where an appeal is taken from a general county court to the Superior Court upon error assigned, but the only exception and assignment of error on appeal from the Superior Court to the Supreme Court is to the judgment of the Superior Court, the Supreme Court will affirm the judgment of the Superior Court when no error appears in the judgment or the record proper. *Messer v. Ins. Co.*, 236.

J Review.

a Of Injunctive Proceedings

1. On appeal in injunction proceedings the Supreme Court has the power to find and review findings of fact. *Teeter v. Teeter*, 438.

APPEAL AND ERROR J a—*Continued.*

2. An exception to findings of fact by the court in injunction proceedings will not be sustained where the findings are supported by sufficient evidence. *Flemming v. Asheville,* 765.

b Of Discretion of Court

1. Motion for joinder of proper party is addressed to discretion of court, and no appeal will lie from court's determination of motion. *Marriner v. Mizzelle,* 204; *Horne v. Horne,* 309, 835.

2. In claim and delivery, motion for sale of property pending trial is addressed to discretion of court from which no appeal will lie. *Winslow Co. v. Cutler,* 206.

3. Court's order in suit to foreclose that bidder at sale should secure bid is in his discretion and is not reviewable. *Koonce v. Fort,* 413.

4. The court has the discretionary power to allow an application for a bill of particulars, C. S., 534, or to grant a motion to require a pleading to be made more definite and certain, C. S., 537, or to strike out in his discretion orders previously made under the statutes, and no appeal will lie from such discretionary orders. *Temple v. Tel. Co.,* 441.

5. The fact that a defendant might have proceeded under C. S., 900-901 for an examination of the adverse party does not render the granting of his motion to require plaintiff to make his complaint more definite and certain or file a bill of particulars improvident as a matter of law, and the trial court's action in striking out such order on the ground that it was improvidently entered is reviewable and will be held for error. *Ibid.*

c Of Findings of Fact

1. The findings of fact by the referee, supported by competent evidence and approved by the trial court, are conclusive on appeal where no error of law is committed on the hearing. *Corbett v. R. R.,* 85; *Moffitt v. Davis,* 566.

2. Where there is no evidence to support the finding of the trial court that the person upon whom service was served was an agent of defendant corporation at the time of the service of summons, the refusal of the corporation's motion to dismiss for failure of service of summons, entered upon its special appearance, will be reversed. *Sellers v. R. R.,* 149.

3. Where a jury trial is waived the findings of fact by the trial judge, supported by evidence, are conclusive on appeal. *Distributing Co. v. Seawell,* 359.

4. The findings of fact by the trial judge upon an appeal from an order of the clerk denying defendant's motion to set aside a judgment under C. S., 600, are not reviewable when supported by competent evidence. *Kerr v. Bank,* 410.

d Presumptions and Burden of Showing Error

1. The burden is on appellant to make error plainly appear, as the presumption is against him. *In re Will of Wilder,* 431.

2. Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Alonzo v. Claverie,* 832; *Bank v. Maney,* 834.

APPEAL AND ERROR J—*Continued.*

e Prejudicial and Harmless Error

1. Plaintiffs sought to set aside a deed on the grounds of fraud and undue influence and mental incapacity of the grantor. The allegations of fraud and undue influence, construing the complaint liberally as a whole, were based upon the age and alleged mental incapacity of the grantor. The trial court sustained a demurrer as to fraud and undue influence and submitted an issue as to mental capacity to the jury, which was answered in favor of defendants. *Held,* the verdict determined the issue of fraud and undue influence as set up in the pleading, and sustaining of the demurrer will not be held for error. *Little v. Little,* 1.

2. In an action involving the residence of one of the parties an exception to the introduction in evidence of a contract between the party and a third person, describing the party as being of a city in another state, is not sustained. *Discount Corp. v. Radecky,* 163.

3. The burden of proof affects a substantial right, and the erroneous placing of the burden of proof on a material matter constitutes reversible error. *McPherson v. Williams,* 177.

4. In this action for damages brought against a railroad company for the negligent killing of plaintiff's intestate at a public crossing by reason of a defective automatic electrical signal, an exception to the admission of evidence as to the condition of a signal at another such crossing is not sustained, it appearing that defendant had brought out similar evidence upon cross-examination. *Keller v. R. R.,* 269.

5. Exceptions to the exclusion of testimony will not be considered on appeal where it is not apparent of record what the answers of the witness would have been if he had been allowed to testify. *In re Will of Wilder,* 431.

6. Where upon the verdict of the jury upon the merits of the case plaintiff is not entitled to recover, error, if any, in the exclusion of evidence of additional damages is immaterial. *Bullard v. Ross,* 495.

7. The refusal of a motion to strike out certain portions of a bill of particulars as irrelevant and immaterial, C. S., 537, will be affirmed where it appears that defendant was not prejudiced thereby, the matter lending itself to an easier determination by correct rulings on the admissibility of evidence offered in support of such allegations. As to whether the refusal of the motion is appealable, C. S., 534, *quære? Pemberton v. Greensboro,* 599.

8. Where defendant denies an allegation in plaintiff's complaint and avers matters in elaboration of such denial, the refusal of plaintiff's motion to strike out such further averment on the ground that it was not made in good faith, but to delay trial by contesting the case, the docket being congested, will not be disturbed on appeal, since the case would remain on the docket as a contested case even if the motion were granted, and it appearing that no harm resulted to plaintiff from the refusal of the motion. As the matter alleged in elaboration of the denial would be competent in evidence merely upon the allegation and denial, whether the ruling affected a substantial right and was appealable, *quære? Teasley v. Teasley,* 604.

APPEAL AND ERROR J e—*Continued.*

9. Where one of the issues between the parties is answered by consent, and as to that issue there is no controversy between the parties, error, if any, in the trial of the issue, or error in the exclusion of evidence tending to impeach the testimony of one of the witnesses in respect to such issue, would not be prejudicial and would not entitle appellants to a new trial. *Trust Co. v. Ebert*, 651.

10. Where in an action to recover for injuries sustained in fall on steps in building a nonsuit is correctly entered for plaintiff's failure to establish defective construction or negligent maintenance of steps, the exclusion of evidence that other guests in the building had fallen on the steps becomes immaterial. *Sams v. Hotel*, 758.

g Questions Necessary to Determination of Cause

1. Exceptions to the admission of certain evidence in this case are not considered on appeal as the case must be tried on its merits, the judgment as of nonsuit entered in the trial court being reversed. *Howard v. Texas Co.*, 20.

2. Where testimony of transactions or communication with a decedent is properly excluded as irrelevant to the issue, its competency or incompetency under C. S., 1795 will not be determined on appeal. *Pendleton v. Spencer*, 179.

3. Where, on appeal, an order sustaining a defendant's demurrer to the complaint is affirmed, such defendant's appeal from an order dismissing its cross-action against another defendant whom it seeks to hold liable only in the event recovery is had against it will also be affirmed. *Brantley v. Collie*, 229.

4. Where actions are correctly nonsuited, other exceptions of record need not be considered. *Baker v. R. R.*, 329.

5. Where plaintiff's cause of action is barred by the statute of limitations set up by defendant, other defenses interposed by defendant need not be considered. *Aldridge v. Dixon*, 480.

K Determination and Disposition of Cause.

f Petitions to Rehear

1. Where it does not appear upon a petition to rehear that the question of law therein presented was decided without due consideration or that the Court overlooked any material fact or principle of law; and no additional authority is presented by petitioners in their brief on the rehearing, and there is no error of law in the decision, the petition will be dismissed. *Jolley v. Tel. Co.*, 108.

g Force and Effect of Decisions of the Supreme Court

1. The force of a decision of the Supreme Court is not affected by lapse of time. *Corbett v. R. R.*, 85.

L Proceedings after Remand.

d Subsequent Appeals

1. Where a motion to strike out a paragraph is allowed in part and the correctness of the ruling refusing the motion as to whole paragraph is determined by appeal, a subsequent appeal presenting the same question will be affirmed. *Pemberton v. Greensboro*, 599.

ARBITRATION AND AWARD.

D Award.

d Time Within Which Award Must be Made

1. N. C. Code, 43(a) held not to apply in this case, and provision that award must be made in certain time may be waived. *Andrews v. Jordan*, 618.

ARMY AND NAVY—War Risk Insurance see Insurance N a.

ARREST AND BAIL see Bail.

ARSON.

C Prosecution and Punishment.

c Evidence

1. In this prosecution for wilfully and wantonly burning a barn in violation of C. S., 4242, the evidence of the felonious origin of the fire and of the identity of the defendant as the culprit is held sufficient to be submitted to the jury, the *corpus deliciti* being reasonably inferable from the circumstances, and there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in the presence of officers, under circumstances calling for a reply, that defendant had committed the crime. *S. v. Wilson*, 376.

ATTORNEY AND CLIENT. (Attorney's neglect not imputable to client see Judgments K b 4.)

B The Relation.

c Attorney's Right to Withdraw from Case

1. An attorney generally employed to defend an action enters into an entire contract to follow the proceedings to their determination, and though he may withdraw from the case with the permission of the court in proper instances, his client is entitled to such specific notice, either before or after the withdrawal, as will permit him to protect his rights. *Gosnell v. Hilliard*, 297.

2. While no rule of universal application has been formulated as to the facts and conditions which would justify an attorney generally employed in a case to withdraw from it with the permission of the court, it is generally held that the client's failure to pay or secure the payment of proper fees upon reasonable demand will justify the attorney in requesting permission of the court to withdraw. *Ibid.*

AUTOMOBILES. (Municipal parking ordinances see Municipal Corporations H d, I a.)

C Operation and Law of the Road.

a Right Side of Road and Law in Passing Cars

1. Evidence tending to show that defendant drove his car on the right side of the road and left sufficient room for an approaching car to pass is insufficient to take the case to the jury in an action by a guest in defendant's car for an injury sustained in a collision of the cars, based on defendant's alleged negligence in failing to turn off the highway and drive on the shoulders of the road, the de-

AUTOMOBILES C a—*Continued.*

fendant having the right to assume that the driver of the approaching car would turn to his right and avoid the collision, and there being no evidence that the situation was such that defendant was negligent in failing to drive on the shoulders of the road. *Corey v. Corey,* 205.

d Stopping, Starting and Turning

1. The act of the driver in attempting to turn his car around at night on a populous highway at a place where there is no intersecting highway is negligence, and when the sole proximate cause of injury to a passenger in his car bars the passenger's right to recover against the driver of the other car involved in the collision. *Newman v. Coach Co.,* 26.

e Parking and Parking Lights

1. The parking of a truck on a public highway at night without lights in violation of C. S., 2621(77), 2621(94), is negligence *per se,* and where the evidence is conflicting as to whether such improper parking proximately caused plaintiff's injuries, resulting from a collision between the truck and the car in which he was riding as a guest, the question of proximate cause is for the determination of the jury upon an appropriate issue. *Barrier v. Thomas and Howard Co.,* 425.

f Ordinary Care in Driving, Attention to Road, Pedestrians

1. Plaintiff's evidence, contradicted by defendant, that the driver of defendant's bus did not slacken his speed but drove straight into the car in which plaintiff was riding although he saw the car as a dark object in the road at night when three hundred feet therefrom is held to raise an issue for the jury. *Newman v. Coach Co.,* 26.

2. The evidence in this case tended to show that plaintiff, a child of ten years, was walking with another child on the shoulders of a highway, that a short distance away several women and children were standing or walking on the shoulders of the highway, and that the road was straight and the view unobstructed, that near the place of the accident there were several houses and a filling station, and that defendant was driving his car at a rate of thirty-five or forty miles an hour and did not blow his horn or give any signal of his approach, and that plaintiff ran in front of his car and was struck and injured thereby. *Held,* a driver is required by statute to slow down and give a warning signal upon approaching pedestrians on the traveled part of a highway, C. S., 2616, and the law requires more than ordinary care in regard to children, and requires that a car shall not be driven at a speed which endangers the life or limb of any person, C. S., 2618, and the evidence of defendant's negligence was properly submitted to the jury. *Moore v. Powell,* 636.

i Contributory Negligence and Last Clear Chance

1. The contributory negligence of a child in running in front of an automobile will not excuse the driver of liability if, under all the circumstances, the driver should have had his car under such control and running at such speed as to have enabled him to have avoided the accident after seeing the child, or after he could have seen the child in the observance of a proper lookout. *Moore v. Powell,* 636.

AUTOMOBILES C—*Continued.*

j Guests and Passengers

1. In order for the negligence of the driver of a car to be imputed to a passenger riding therein it is necessary that the passenger have such control over the car as to be substantially in joint possession of it, and the fact that driver and passenger have a common enterprise in riding is not sufficient. *Newman v. Coach Co.*, 26.

2. In an action against a railroad company for the wrongful death of plaintiff's intestate, killed in a collision between defendant's train and the automobile in which the intestate was riding as a guest, the plaintiff is entitled to recover if the negligence of the railroad company was the proximate cause of the collision, or one of the proximate causes thereof, if the intestate was not guilty of contributory negligence, and the negligence of the driver of the car will not be imputed to the guest unless he had such joint control over the car as to have it in common possession with the driver. *Johnson v. R. R.*, 127.

3. The burden is on defendant to prove the contributory negligence of a guest riding in an automobile in an action by the guest's administrator to recover for his wrongful death, and where plaintiff's evidence fails to show that the guest did not warn the driver of the impending danger of the collision resulting in the injury, or did not protest or take any action to prevent the collision, and fails to show that the guest saw defendant's approaching train and that the driver did not see it, an instruction to answer the issue of contributory negligence in the negative is correct. *Johnson v. R. R.*, 127.

4. In an action by an administrator of a guest killed in a collision between the automobile in which he was riding and defendant's railroad train at a public crossing, the issue of contributory negligence, tendered on the theory that the driver's negligence was imputed to the guest, is properly refused where the evidence discloses that the car was being driven independently by the owner and that the guest had no control over its operation. *Keller v. R. R.*, 269.

5. Under the laws of Virginia a gratuitous guest in an automobile may not recover damages from the driver for negligent injury unless the injury is the result of the driver's culpable negligence, and the law of Virginia governs an action instituted here involving liability of a driver for damages resulting from an accident occurring in Virginia. *Wise v. Hollowell*, 286.

6. The evidence tended to show that concrete pillars were constructed to support a railroad trestle over a highway underpass, that the center pillar stood in the middle of the highway with a distance of 10½ or 11 feet on either side for the passage of traffic, that the pillar had reflectors placed on it by the State Highway Commission, that the Highway Commission had approved the plans for the underpass, and that the driver of a car in which plaintiff's intestate was riding as a guest, fell asleep and ran the car into the pillar, resulting in the death of plaintiff's intestate. *Held*, the negligence of the driver was active, while the negligence of the railroad company, if any, in the construction of the underpass was passive, and the driver's negligence *is held* to be the sole proximate cause of the

AUTOMOBILES C j—*Continued.*

accident barring a recovery against the railroad company for the guest's death, and rendering it unnecessary to decide whether defendant railroad company could be held liable for negligent construction of the underpass in view of its approval by the State Highway Commission. *Baker v. R. R.*, 329.

m Sufficiency of Evidence and Nonsuit

1. Evidence tending to show that the rear of plaintiff's car had passed the center of the intersection of two city streets when it was struck by a car driven by defendant approaching the intersection from plaintiff's left, that defendant drove his car at a speed greatly in excess of the legal maximum in approaching the intersection and drove down the middle of the street, and that the front of defendant's car struck the left rear wheel of plaintiff's car, resulting in serious damage to plaintiff's car and injury to plaintiff, and that plaintiff was driving slowly when he entered the intersection, *is held*, sufficient to overrule defendant's motion as of nonsuit in plaintiff's action for actionable negligence. *Hobbs v. Kirby*, 238.

n Culpable Negligence

1. Evidence tending to show that defendant drove his car along a beach at forty-five or fifty miles an hour, that there were small ridges, and soft places in the sand, and that pieces of wrecks were buried in the sand of which condition the driver had knowledge, and that he disregarded the repeated protests and requests of a guest in the car to slacken the speed of the car, and turned the car over and killed the guest when he attempted to swerve the car around an old wreck nearly buried in the sand, *is held* sufficient evidence of wanton and reckless driving to be submitted to the jury on the issue of culpable negligence. *Wise v. Hollowell*, 286.

2. In this action to recover for the wrongful death of plaintiff's intestate who was killed in a collision occurring in Virginia while intestate was a guest in defendant's car, the Virginia law requiring a showing of culpable negligence on the part of defendant applied. The court instructed the jury on the question of intestate's contributory negligence that defendant must have knowingly and wantonly added to the risks which might ordinarily have been expected under the circumstances, in order for plaintiff to recover, and defined "knowingly" as "intentionally." *Held*, the charge does not contain reversible error on defendant's exceptions. *Ibid.*

D Liability of Owner for Injuries to Third Persons by Driver.

b Fact of Agency or Employment

1. In emergency in this case employee held authorized to hire driver for defendant's truck. *Barrier v. Thomas and Howard Co.*, 425.

2. Evidence that defendant's son called defendant on long distance, requested her to send her car to a certain town so that he might return to his home more quickly, which he desired to do because of his wife's sudden illness, that the son was of age and that at the time was not living with defendant, that the son occasionally used the car as a member of the family, and that in response to the call defendant sent her chauffeur with the car to the place designated and that on the journey the chauffeur had an accident resulting in injury to plaintiffs, *is held* sufficient to be submitted to

AUTOMOBILES D b—*Continued.*

the jury on the issue of whether the chauffeur was defendant's agent at the time, the evidence being sufficient to support an inference to that effect, and the inferences to be drawn from the evidence being for the determination of the jury. *Dickerson v. Reynolds*, 770.

c Family Car Doctrine

1. In determining whether a driver of an automobile is a member of the family of the owner of the car within the meaning of the "family car doctrine" the rule for determining the family relationship in actions to recover for services rendered a decedent may be applied: those living in the same household subject to the general management and control of the head thereof, and dependent on such supervising and managing head, and mutual gratuitous services with no intention on one hand of paying for such services and no expectation on the other hand of receiving compensation. *McGee v. Crawford*, 318.

2. Plaintiff's intestate was killed while riding as a guest in a car driven by one of defendants and owned by the other defendant, the grandfather of the driver. There was evidence that the driver of the car had lived with his grandfather for two years and worked in his grandfather's store under an agreement that the grandfather was to furnish him board and lodging and one dollar a day, that the grandson had his own car and used his grandfather's family car for his own pleasure only on this occasion, and there was evidence by plaintiff that the grandson lived with his grandfather as a member of the family. *Held*, the evidence as to whether the grandson was a member of the grandfather's family within the purview of the "family car doctrine" was conflicting, and the issue, on the question of the grandfather's liability, should have been submitted to the jury under correct instructions from the court. *Ibid.*

3. Evidence that a father allowed his son under sixteen years of age to drive his truck, that the father had been told that the son was a reckless driver, and that the son while driving the truck to a certain destination as instructed by his father, drove carelessly and recklessly, resulting in an accident and injury to a gratuitous guest riding in the truck, is held properly submitted to the jury in the guest's action against the father to recover for the damages sustained. *Fields v. Brown*, 543.

E Liability of Owner for Injury to Driver.

b Defective Condition of Car and Duty of Inspection

1. Where a husband owns an automobile for family use and the wife sustains a personal injury while driving upon a highway, and brings action against her husband for damages, alleging his failure to inspect the car and not keeping it in a safe and suitable condition as the cause of the injury she has sustained, a demurrer to the complaint is properly sustained in the absence of allegation that the husband knew of the defective condition and failed to warn his wife, their relation in this respect being analogous to that of principal and agent or master and servant, the latter having the same opportunity of discovering the defect before using the car. *Lyon v. Lyon*, 326.

"BAD CHECK LAW" see Bills and Notes D f.

BAIL.

B In Criminal Prosecutions.

e Liabilities on Bail Bonds

1. Where defendant and the sureties on his appearance bond appear in answer to a *scire facias* and show that defendant's failure to appear at a prior term of court in accordance with the terms of the bond was due to the fact that defendant had been turned over to the Federal Court by a prior bondsman and that defendant was then serving a sentence imposed by that court, it is error for the court to enter absolute judgment on the bond, C. S., 791, the cases against defendant as well as the hearing on the *scire facias* being subject to continuance. *S. v. Welborn*, 601.

BANKS AND BANKING.

C Function and Dealings. (Whether bank is purchaser or collecting agent of draft see Bills and Notes B c; rights and liabilities of banks in collection of checks see Bills and Notes D.)

c Deposits

1. Deposit by husband in name of husband and wife is property of husband with agency to wife to draw thereon. *Nannie v. Pollard*, 362.

H Insolvency and Receivership.

a Statutory Liability on Stock

1. A statutory stock assessment levied against a stockholder in an insolvent bank who has been adjudicated a lunatic prior to the assessment, N. C. Code, 218(c) (13), such assessment having been made without service on his committee or guardian or upon a guardian *ad litem* appointed by the court, is void, and may be attacked upon his subsequent death, by his administrator by appeal to the Superior Court from such assessment. *Hood v. Holding*, 451.

2. Plaintiff purchased the claims of depositors in a closed bank and tendered them to the liquidating agent in payment of his stock assessment levied against him upon his stock in the bank. The liquidating agent declined to so apply the claims and plaintiff brought suit. *Held*, claims of depositors cannot be offset against the statutory liability on stock, only dividends on such claims being so applicable, and chapter 344, Public Laws of 1933, has no application, and even if the statute were applicable the result would not be affected, the statute being void. N. C. Code of 1931, sec. 219(a). *Pritchard v. Hood*, 790.

d Collection of Debts, Off-sets and Counterclaims

1. A partnership deposit may not be set off against a debt due the bank by one of the partners upon demand of both partners made after the insolvency of the bank, the demand being in effect an assignment of the deposit after insolvency, entitling the assignee only to a pro rata distribution in the bank's assets. *In re Bank*, 333.

2. The fact that the cashier of a bank is given license to charge a debt due the bank by a member of a partnership to the partnership account at any time does not affect the rule that after insolvency

BANKS AND BANKING H d—*Continued.*

of the bank the partnership account may not be used as an off-set against one partner's debt to the bank, the license not having been exercised while the cashier had authority to act. *Ibid.*

3. Claim for deposit may not be off-set against statutory liability on stock in insolvent bank. *Pritchard v. Hood*, 790.

4. Act allowing depositors in certain closed banks in certain areas to sell their claims for deposits to certain classes of debtors of the banks affected, and providing that the purchasers might off-set the purchased claims against debts due the bank *held* unconstitutional. *Edgerton v. Hood*, 816; *In re Trust Co.*, 822.

e Claims, Priorities and Distribution

1. Evidence in this case is held sufficient to support the findings of fact by the referee that defendant bank, in dealing with itself, bought certain collateral for plaintiff's trust estate at a price in excess of its market value, and charged and received certain unlawful commissions in transactions with the estate, and thus augmented the cash in its vaults, and judgment affirming the referee's findings and declaring plaintiffs entitled to a preference in the bank's assets upon its later insolvency is upheld. *Lauerhass v. Hood*, 190.

2. Plaintiff entered suit by publication against her nonresident husband for reasonable subsistence and counsel fees and attached money belonging to her husband on deposit in defendant bank in the name of the executrix of the estate of the husband's father. The bank and the executrix were made parties to the action. Judgment was entered in the wife's favor and ordering the bank to hold the deposit and pay it out from time to time as ordered by the court for the subsistence of the wife and her minor children. The bank later became insolvent. *Held*, the judgment changed the deposit from a general deposit to a deposit for a specific purpose, entitling the wife to a preferred claim against the bank's assets, the deposit being no longer subject to check by the executrix after the rendition of the judgment. *Zachary v. Hood*, 194.

3. A depositor in a bank agreed to keep the deposit intact so long as the bank loaned a like sum to a third person, the bank having the right to call the loan to the third person if the deposit was withdrawn, and the depositor having the right to withdraw the deposit if the bank should call the loan: *Held*, upon the insolvency of the bank, the depositor was entitled to a preferred claim under the authority of *Flack v. Hood, Comr.*, 204 N. C., 337. *Lawrence v. Hood*, 268.

4. Where in an action against the receiver of an insolvent bank to have plaintiff's claim declared a preference in the bank's assets, the complaint alleges that plaintiff purchased with cash the bank's check drawn on another bank, which check was not paid on account of the later insolvency of drawer bank, and the complaint does not allege that the check was a certified check or a cashier's check in the hands of a third person as a holder for value, or represented sums collected by the drawer bank and not paid: *Held*, defendant's demurrer is properly sustained, the complaint failing to allege facts sufficient to constitute the claim a preference either under the provisions of N. C. Code, 218(c) (14), or under the trust fund

BANKS AND BANKING H e—*Continued.*

theory, and the allegations of the complaint that the claim constituted a preference may be disregarded on demurrer as a conclusion of law. *Tea Co. v. Hood*, 314.

5. Where a will appoints a bank which is not authorized to do a trust business, as "agent" to collect notes due the estate, take charge of all personalty and pay the interest therefrom to the testator's wife during her life and at her death to divide the funds equally among the testator's children, and the bank takes charge of the personalty and commingles the trust funds with its general funds, but issues to itself certificates of deposit for the trust funds, less its commissions, and pays interest to the testator's wife, without objection, until its receivership: *Held*, the trust funds are not a special deposit entitling the testator's children to a preference in the bank's assets in the hands of the statutory receiver. *Underwood v. Hood*, 399.

6. A depositor drew his draft on his local bank against his general deposit therein, and the payee of the draft immediately forwarded it to the drawee bank, which held it for several days, and upon its later insolvency, mailed the draft back to the payee with a notation of its insolvency. The drawer paid the drawee the amount of the draft and filed a claim for preference with the statutory receiver of the drawee bank. *Held*, the deposit was not impressed with a trust, nor was the claim entitled to a statutory preference, C. S., 218(c) (14), and if the drawee bank's failure to return the draft within twenty-four hours after its receipt by mail implied an acceptance, C. S., 3118, 3119, such acceptance does not *ipso facto* create a preference. *Lamb v. Hood*, 409.

7. A depositor drew a check in the bank's favor for a part of his deposit and instructed an officer of the bank to buy Liberty Bonds with the proceeds. Several days later the bank sent a cashier's check for the amount with an order for the bonds to a broker. The bank closed its doors because of insolvency on the day the broker received the cashier's check, and the broker returned the check which was credited to the depositor's account by the liquidating agent. *Held*, the depositor was not entitled to a preference for the amount of his check to the bank. *Dupree v. Harrell*, 595.

8. The fact that an agent notifies a bank that a deposit made therein by him was made with moneys belonging to his principals in order to prevent the bank's right to equitable set-off of the funds against the amount due the bank by the agent does not entitle the principals to a preference in the bank's assets upon its later insolvency on the ground of their beneficial or equitable ownership of the funds, there being no agreement that the deposits should be segregated from general funds of the bank. *Slater v. Trust Co.*, 775.

9. An agent notifying a bank that deposits made by him therein were made with moneys belonging to his principals is not entitled to a preference in bank's assets upon its later insolvency. *Ibid.*

10. Judgment that plaintiff was entitled to preferred claim in assets of insolvent bank affirmed upon authority of *Flack v. Hood, Comr.*, 204 N. C., 337. *Cocke v. Hood*, 832.

BANKS AND BANKING—*Continued.*

I Criminal Responsibility of Officers.

f Making Unlawful Loans

1. Evidence that the president and cashier of a bank made loans to one of its directors or to corporations in which he was pecuniarily interested, and that each of the parties knew of the loans and the renewals thereof and that such loans were in excess of the legal limit to which the bank could loan to one person, direct or indirect, the loans being greatly in excess of twenty per cent of the capital stock and permanent surplus of the bank, N. C. Code, 220(b), (d), and that the loans were made with intent to cheat, injure or defraud the bank, *is held* sufficient to be submitted to the jury as to each defendant's guilt of criminal conspiracy to make loans in violation of the statute, punishable upon conviction by imprisonment in the State's prison, the fact that the loans were made by the parties under the conditions being a circumstance from which the jury could infer an agreement to make the loans with criminal intent. *S. v. Davidson*, 735.

BILLS AND NOTES.

A Requisites and Validity.

a Consideration

1. Where a widow executes notes to a bank and receives from the bank notes executed by her husband before his death, the bank marking the husband's notes paid and delivering them to the widow, the widow may not maintain that she was not liable on the notes executed by her because they were not supported by consideration, the surrender and cancellation of the notes executed by the deceased husband and the release of his estate from liability being sufficient consideration for the widow's notes. *Bank v. Harrington*, 244.

2. It is presumed, prima facie, that negotiable notes are issued by the maker for a valuable consideration, C. S., 3004, with the burden on the maker to show failure of consideration when relied on by him. *Ibid.*

B Negotiation and Transfer.

c Distinction Between Purchaser and Agent for Collection

1. The purchaser of a draft is one who acquires unconditional title thereto, with no agreement, expressed or implied, to charge the draft back if it is not paid, and the right to charge the draft back may be inferred from the course of dealing between the parties. *Denton v. Milling Co.*, 77.

2. Where the evidence is conflicting as to whether a party is a purchaser of a draft or an agent for its collection the question is one for the jury, but where the evidence is susceptible of only one interpretation it is a question of law for the court, but where the facts relating to the party's acquisition of the paper are not in dispute, his testimony that he was a purchaser is incompetent as invading the province of the jury and as being of a mere conclusion of the witness. *Ibid.*

3. Where the uncontradicted evidence is to the effect that a customer of a bank daily sent the bank drafts containing a notation that

BILLS AND NOTES B c—*Continued.*

they were not to be considered as a deposit but were to be accounted for upon collection to the customer, the drawer, that the bank credited the drawer's account therewith and allowed him to check thereon immediately, but customarily charged the drafts back to the drawer's account if they were not paid: *Held,* the evidence discloses as a matter of law that the bank was an agent for the collection of the drafts and not a purchaser thereof, and where the proceeds of some of the drafts have been attached by a creditor of the drawer, the bank may not successfully intervene and claim title thereto. *Ibid.*

C Rights and Liabilities of Parties. (Right to presentment, notice, etc., see hereunder F; discharge by payment see hereunder G.)

b As Between Original Parties

1. In an action by the payee of a negotiable note under seal, appearing upon its face to have been signed by several makers, it may be shown upon the trial by parol evidence that with the knowledge of the payee before his acceptance only one of them signed as the original obligor, and that the others signed as sureties only, entitling the sureties to their release upon their defense of the statute of limitations. C. S., 441(1). *Furr v. Trull,* 417.

c Endorsers and Sureties

1. Defendant, an administrator, endorsed a note in the name of the estate, thereunder writing his name as administrator. In an action on the note by the payee judgment was rendered against the makers, which judgment was not paid, and the payee sought to recover on the endorsement. The payee did not allege that the intestate was indebted to him at the time of his death or that his estate received any consideration for the note. Defendant alleged that he signed the note as an accommodation to the makers: *Held,* plaintiff was not entitled to judgment on the pleadings against the administrator in his representative capacity. *Banks v. Vance,* 103.

2. Where an administrator signs a note in the name of the estate and thereunder writes his name as administrator, and at the time of the execution of the note the parties agree that he should not be personally liable thereon, the payee may not hold the administrator personally liable thereon, C. S., 3001, and where in an action on the note the administrator alleges such agreement the plaintiff payee is not entitled to judgment on the pleadings against him personally. *Ibid.*

3. A surety on a negotiable note is absolutely required to pay same and is a party primarily liable under the terms of the negotiable instruments law. C. S., 2977. *Dry v. Reynolds,* 571.

e Bona Fide Purchasers and Holders in Due Course

1. Transferee of note after maturity held not a holder in due course although transfer was made to him in consideration of his loaning money with which to pay the note held by a company in which he was interested, he and his company being separate entities and the transaction amounting to a novation. *Holland v. Dulin,* 202.

2. The bona fide purchaser of an unregistered municipal bond, negotiable by delivery, the purchase being made for value, without notice, and

BILLS AND NOTES C e—*Continued.*

before maturity from a reputable dealer also without notice, obtains good title thereto although the bond had been stolen from the former owner. *Stricker v. Buncombe County*, 536.

3. Holder in due course may recover principal of note although payee withheld part thereof to avoid usury law. *Bank v. Jones*, 648.

D Checks and Drafts.

a Acceptance and Liability of Drawee Bank

1. The payee of a check may not hold the drawee bank liable thereon until the drawee bank has accepted the check. C. S., 3171, although the drawee bank has accepted the payer's note to cover overdrafts under an agreement to pay all checks drawn during the tobacco season. *Brantley v. Collie*, 229.

c Rights and Duties of Payee

1. Where a jury trial is waived and the trial court finds that the payee was given a check in payment of goods purchased by the drawer, that the check was delivered to the payee at seven o'clock, p.m., 21 December, and that if the check had been deposited in the payee's bank in another town the next morning it would not have cleared the drawee bank before it permanently closed because of insolvency after the close of business 24 December, and that the payee had no reason to apprehend the precarious condition of the drawee bank, the trial court's judgment that the payee was not guilty of unreasonable delay in holding the check until after the insolvency of the drawee bank, in that the check would not have been paid if presented in due course, and allowing the apyee to recover on the original debt for the goods, is upheld, the findings of fact in the case being conclusive on appeal. *Raines v. Grantham*, 340.

f Criminal Liability for Giving Worthless Checks

1. A check given with an agreement with the payee to hold it and present it at a future date does not come within the provisions of the "bad check law," and where defendant testifies to such agreement it is error for the court to direct the jury to find defendant guilty if they believed all the evidence beyond a reasonable doubt. *S. v. Tatum*, 784.

E Modification and Alteration.

a Effect of Material Alteration

1. Where the payee of a negotiable instrument acquires it with certain endorsers thereon and subsequently strikes out the name of one endorser and another signs as endorser in lieu of the endorser whose name was stricken out, the change is a material one and will release the endorsers who had not consented to the substitution, but will not release those endorsers whose consent had been procured. C. S., 3106, 3107. *Efird v. Little*, 583.

2. Where an endorser as originally appearing on a negotiable note has his name stricken from the instrument by the payee and another person signs in substitution for him, the liability of the substituted endorser to the payee remains as a general endorser, unaffected by the cancellation and substitution, C. S., 3047, when his signature is not obtained by misrepresentation that the other endorsers had consented to the substitution and remained bound by the instrument. *Ibid.*

BILLS AND NOTES—*Continued.*

F Presentment, Demand, Notice and Protest.

a Time and Place of Presentment

1. In determining what is a reasonable time for the presentment of a check for payment regard must be had to the nature of the instrument, the customs and usages of trade in regard to such instrument, and the facts of the particular case. C. S., 2978, 3168. *Raines v. Grantham,* 340.

c Effect of Failure to Present

1. Where a note is made payable at a certain bank, the failure of the payee to present it for payment at the bank on the date due does not release the maker or surety on the note, both maker and surety being parties primarily liable on the note. C. S., 3051. *Dry v. Reynolds,* 571.

e Waiver of Notice

1. A waiver of notice on a negotiable instrument is generally binding on the parties thereto, and it is generally immaterial where the waiver of notice appears on the instrument, and in this case a waiver of notice and consent to extension of time for payment without notice, printed in bold-face type on the upper left-hand corner of the instrument *is held* a valid waiver of the rights of the sureties upon an extension of time for payment granted the maker without notice. *Rasberry v. West,* 406.

G Payment and Discharge.

a Payment and Discharge in General

1. Where a note is made payable at a certain bank it amounts to an order to the bank to pay same out of the maker's deposit upon presentment when due. C. S., 3069. *Dry v. Reynolds,* 571.

2. The fact that the maker of a negotiable note payable at a certain bank kept a deposit sufficient to pay the note at the bank on the due date may amount to a tender of payment under C. S., 3051, but such tender would discharge only persons secondarily liable on the note, and would not discharge the liability of the maker and surety on the note, C. S., 3102, and the bank is regarded as the agent of the maker for the payment of the note upon presentment, and not the agent of the payee, and the liability of the maker and surety is not discharged by the payee's failure to present the note for payment at the bank on the due date. *Ibid.*

3. An instruction that a negotiable instrument may be discharged by any act which would discharge a simple contract for the payment of money is not error. C. S., 3101. *Bank v. Oil Co.,* 778.

4. Where in an action on a note the maker and sureties rely on the discharge of the note by the payee's acceptance of the note of another party in the sum due, and the payee's delivery to them of the papers on which defendants were bound, the payee's objection to the introduction of a deposition of a witness bearing directly on the alleged contract on the ground that it tended to release a written instrument by parol and that the contract alleged was not in writing, cannot be sustained, the contract alleged being a discharge of the debt under C. S., 3101, by intentional cancellation by the payee which is not required to be in writing. *Ibid.*

BILLS AND NOTES—*Continued.*

H Actions.

b Evidence and Burden of Proof

1. Defendants, husband and wife, being indebted to plaintiff, endorsed a note in which the wife was payee over to the plaintiff, the endorsement being a guarantee of payment and stating that it was signed with full knowledge of the contract. The note was not paid in full, and plaintiff instituted action to recover the balance due. The male defendant was allowed to testify that he had transferred the note over to plaintiff in full settlement of the debt: *Held*, the evidence was incompetent as being in contradiction of the terms of a written instrument, C. S., 3044, and plaintiff is entitled to a new trial on his exception to the court's charge to the jury based upon such evidence. *Carr v. Clark*, 265.

2. Admission of execution of notes establishes prima facie case, but burden on the issue remains on plaintiff. *Stein v. Levins*, 302.

3. When matters directly in issue are admitted it is unnecessary to offer the admission in evidence, but it is otherwise if the admissions are independent of and collateral to the issue raised by the pleadings, and in an action on negotiable notes, the admission by defendant of the execution of the notes dispenses with the necessity of proving execution, but not with the necessity of introducing the notes in evidence. *Ibid.*

4. Burden of proof on plea of cancellation of note is on defendant, and nonsuit may not be entered in his favor. *Trust Co. v. Ebert*, 651.

d Issues and Verdict

1. Sole issue of indebtedness held insufficient to prevent defendant's defense that note was for purchase price of merchandise and that note and sale contract were obtained by fraudulent misrepresentations. *Colt Co. v. Barber*, 170.

2. Where from the admission of the parties in an action on a note the action would be barred by the statute of limitations if it should be determined that defendants were sureties on the note and not comakers, the submission of issues presenting solely whether each was a surety or comaker is sufficient. *Furr v. Trull*, 417.

BROKERS.

A The Relationship.

b Power of Fiduciaries to Make Contract

1. An executor of an estate has no power to bind the estate by a brokerage contract with a real estate agent for sale of lands belonging to the estate, unless it is made to appear that such power was given under the will or otherwise, and where there is no evidence that the executor had been given such authority a demurrer is properly sustained in an action against the executor in his representative capacity by the real estate broker to recover commissions for procuring a proposed purchaser upon the terms agreed upon, the real estate broker being chargeable with knowledge of the legal limitations on the executor's authority. *Harris v. Trust Co.*, 526.

BROKERS—*Continued.*

D Right to Commissions.

a Procuring Purchaser Upon Terms Agreed

1. Where the contract with a real estate agent is that he shall sell lands upon commission at a certain price for cash and he finds a purchaser who agrees to buy at the price fixed, in the agent's action to recover the commission, the question as to whether the proposed purchaser was able and willing to pay the purchase price in cash may not be taken advantage of by the seller where he has not tendered a deed to the lands and has not demanded the cash payment. *Harris v. Trust Co.*, 526.

b Consummation of Sale and Principal's Right to Reject Sale or Contract

1. Where in an action to recover commissions the broker testifies that he was to receive a certain per cent on all sales made when ratified by defendant and that he had received commission on all such sales except the sale in suit, and it appears from the evidence that defendant refused to ratify the sale in suit on grounds stipulated in the contract to be passed upon by defendant, the broker is not entitled to recover. *Sweet v. Spinning Co.*, 134.

2. Where in an action by a broker to recover commissions alleged to be due on sales made by him he introduces evidence that he negotiated a contract between defendant and another providing for the sale of a certain quantity of goods, but it appears from the evidence that the contract provided that it should not be effective until signed by defendant, and that it was never signed, and plaintiff testifies that defendant told him over the telephone that the proposed contract of sale would have to be approved by his board of directors, and the uncontradicted evidence discloses that the board of directors expressly refused to approve the contract, the evidence discloses that no binding contract of brokerage had been consummated, and plaintiff is not entitled to recover. *Ibid.*

CANCELLATION OF INSTRUMENTS—Cancellation of deed to city see Municipal Corporations F e; right of reëntry for condition broken see Deeds and Conveyances C f 1.

CARRIERS.

B Carriage of Goods.

b Tariffs, Charges and Penalties

1. A railroad's deliberate and peremptory refusal to accept shipments properly tendered with the correct freight charges entitles the shipper to the penalties prescribed by C. S., 3515, and where in an action to recover the prescribed penalties the referee finds upon ample evidence in a hearing in which no error of law is committed, that the shipment came within a certain classification, and that the shipper tendered the correct amount for such classification, and the finding is approved by the trial court, such finding is conclusive on appeal, and the carrier may not successfully contend that the shipment came within another classification for which higher freight charges were prescribed, and where a higher tariff has been charged on one shipment the shipper is entitled to recover the excess paid. *Corbett v. R. R.*, 85.

CARRIERS B b—*Continued.*

2. C. S., 3515, providing a penalty for a carrier's refusal to receive and forward freight duly tendered with proper freight charges, is constitutional as applied to intrastate shipments. *Ibid.*

3. Ambiguous tariffs are to be construed favorably to the shipper, and where two descriptions and tariffs are equally appropriate the shipper is entitled to the one specifying the lower rate. *Ibid.*

4. Evidence that shipper's contract to deliver certain merchandise was canceled because of carrier's wrongful refusal to accept the merchandise for shipment *is held* sufficient to support the referee's finding of actual damages, profits which would have been certainly realized but for carrier's wrongful refusal of the shipment being recoverable under C. S., 3515. *Ibid.*

CHATTEL MORTGAGES. (Conditional Sales see Sales I.)

B Lien and Priority.

b Registration and Indexing

1. The meaning of the term "residence" depends upon the connection in which it is used, and the term is not synonymous with "domicile," and the term as used in our statute requiring the registration of a chattel mortgage in the county in which the mortgagor resides, or if the mortgagor is a nonresident, in the county in which the property is situated, to be effective as against creditors and purchasers for value, C. S., 3311, is the actual personal residence of the mortgagor, and the instruction in this case, construed as a whole, properly submitted to the jury upon conflicting evidence whether the mortgagor was a resident of the county in which the mortgage was recorded or a nonresident with his domicile in another state. *Discount Corp v. Radecky*, 163.

C Construction and Operation.

c Instruments Constituting Chattel Mortgages

1. A paper-writing, whatever its form, will be construed as a mortgage if by proper interpretation the intent is made to appear that it is to secure the payment of a debt in a certain amount and creates a lien upon sufficiently described property, the lien to be discharged upon payment of the debt according to its terms. *Grier v. Weldon*, 575.

D Rights and Liabilities of Parties.

a Right to Possession

1. Under the common law, which prevails in North Carolina, a chattel mortgage passes the legal title to the property pledged to the mortgagee, defeasible by the subsequent performance of its conditions, and the mortgagee is entitled to immediate possession of the property unless there is an express or implied agreement by the parties to the contrary. *Grier v. Weldon*, 575.

2. Where a farmer buys a mule and gives the seller a chattel mortgage to secure the balance of the purchase price and thereafter uses the mule in the cultivation of his crops, there is at least an implied agreement that the mortgagor should have possession of the mule, and where upon the debt falling due, the parties agree upon an extension of time for payment until after the harvesting of the next

CHATTEL MORTGAGES D a—*Continued.*

fall crop, the debt is not due until the expiration of the extension agreement, and where the mortgagee takes possession by claim and delivery prior to the expiration of the extension agreement, his possession is wrongful, and the mortgagor may recover the difference between the value of the mule at the time of such seizure and the unpaid balance of the purchase price. The sufficiency of consideration for the extension agreement is not presented in this case, but *semble* there was sufficient consideration. *Ibid.*

CHECKS see Bills and Notes D.

CLAIM AND DELIVERY AND REPLEVIN.

C Possession and Disposition of Property.

c Sale Pending Action

1. Plaintiff took possession of certain mules from defendant by claim and delivery and the execution of the statutory bond, and moved that the mules be sold and the proceeds of sale held pending the determination of the issue of title between the parties. *Held*, even if the court had the power to order the sale of the mules over defendant's objection, the motion was addressed to the discretion of the court, and the court's refusal of the motion is not reviewable. *Winslow Co. v. Cutler*, 206.

F Trial.

e Judgments

1. In this case it was determined by the verdict of the jury that replevying defendant was the owner of the property, and it was admitted in the pleadings that the property when paid for by plaintiff was to belong to plaintiff. The verdict established that the value of the property at the time of the seizure was $600 and its present value $300, and the plaintiff was indebted to defendant in the sum of $300. *Held*, a judgment in defendant's favor for $300 to be a lien on the property is, in view of the admission, in substantial compliance with the law. *Connor v. Mason*, 412.

G Liability on Bonds and Undertakings.

a Extent of Liability on Replevin Bond

1. While a replevin bond executed by a defendant in claim and delivery is not required by statute to cover the costs of the action in any court inferior to the Superior Court if the issue should be finally determined in plaintiff's favor, C. S., 836, where the bond is written to cover such costs, and there is no allegation of fraud or mistake entitling the principal or surety on the bond to equitable relief, the plaintiff in the claim and delivery action may enforce the payment of the costs incurred in the recorder's court against the principal and surety on the bond upon a final determination of the case in plaintiff's favor upon appeal. *Wright v. Nash*, 221.

CLERKS OF COURT—Summary proceedings on bonds of, see Principal and Surety C.

COMMERCE—Right of State to regulate intrastate commerce see Carriers B b 2.

COMPENSATION ACT see Master and Servant F.

COMPROMISE AND SETTLEMENT.

A Requisites and Essentials.

b Mutuality of Parties and Accounts

1. Where there is evidence that a mercantile business carried on by the decedent and his son as a partnership was carried on by the son as executor for several years after the father's death, and that later the business was incorporated without change of location or method of operation, those interested being the widow and children of the deceased, the son being in entire charge of the corporation, and that the son and the personal representative of a deceased customer came to an agreement as to the amounts due by the customer to the partnership and the corporation and the amounts due by each of these concerns to the customer, and that the personal representative paid the son the amounts due to each of the concerns by the customer, and the son promised to pay the personal representative the amount due by the partnership to the customer's estate, but failed to do so, and that thereafter the partnership went into bankruptcy and the personal representative received only a small part of the amount admitted to be due by the partnership. *Held*, sufficient to sustain the findings of fact by the court after reference that a settlement had been made between the corporation, the plaintiff in the action, and the personal representative of the customer, and to sustain the judgment of the court denying recovery against the personal representative on a guaranty on a note executed by the customer to the corporation for the purchase price of land sold. *Horne Corp. v. Creech*, 55.

CONSOLIDATED STATUTES AND SECTIONS OF MICHIE'S CODE CONSTRUED. (For convenience in annotating. General rules for construction of statutes see Statutes.)

SEC.

60. Devisee may be held liable by creditor of estate only to extent of property devised. *Moffitt v. Davis*, 565.

93. Docketed judgment comes within fifth class and is not a "specific lien on property." *Stewart v. Doar*, 37.

93, 7980. Deficiency after foreclosure of decedent's mortgage and taxes come within first and third classes of priority, and result is not affected by requirement that trustee pay taxes out of proceeds of foreclosure sale. *Fertilizer Co. v. Bourne*, 337.

105, 106. Clerk may order executor to file accounting under penalty of contempt. *In re Hege*, 625.

137(6). Where soldier dies without wife, children, issue of children or mother him surviving, his father is his sole heir, and is entitled to proceeds of War Risk Insurance. *In re Saunders*, 241.

160. Provision that action must be brought within one year is condition annexed to cause of action, and is unaffected by allegations that fact of intestate's death was kept secret. *Curlee v. Power Co.*, 644.

218(c), (13). Statutory stock assessment against insane person is void in absence of service or appearance. *Hood, Comr., v. Holding*, 451.

218(c), (14). Complaint held insufficient to state cause of action for preference in insolvent bank's assets. *Tea Co. v. Hood, Comr.*, 313; *Lamb v. Hood, Comr.*, 409.

CONSOLIDATED STATUTES *Continued.*

Sec.

219(a). Claim for deposit may not be off-set against statutory liability on stock. *Pritchard v. Hood, Comr.*, 790.

220(b), (d). Evidence held sufficient to be submitted to jury on issue of criminal conspiracy to make loans in violation of statute. *S. v. Davidson*, 735.

324. Rule that public official's bond covers whole term of office may be modified by contractual provision to contrary. *Washington v. Trust Co.*, 382.

335, 1297(12). County commissioners may be held liable for failure to perform ministerial duty of requiring bond of clerk. *Moffitt v. Davis*, 565.

356. Summary proceeding should have been consolidated with creditors' bill. *Power Co. v. Yount*, 321.

405. Limitation on tax foreclosure certificate may not be taken advantage of by demurrer. *Logan v. Griffith*, 580.

405, 2592, 2593. Statute of limitations need not be pleaded in proceeding for distribution of funds from foreclosure in nature of controversy without action. *In re Gibbs*, 312.

412. Claim held filed within one year of issuance of letters testamentary and action was not barred. *Horne Corp. v. Creech*, 55.

421. Purchase of merchandise on credit, the purchaser paying a sum in cash each fall, and the balance due on account being carried forward into the next year held not a mutual, open and running account. *Supply Co. v. Banks*, 343.

437(3), 2589. Where note and power of sale are barred by statutes of limitation mortgagor may enjoin foreclosure without paying note. *Serls v. Gibbs*, 246.

439. Statute held to run against surety on official bond from expiration of contractual period of bond. *Washington v. Trust Co.*, 382.

439(2). Action against guardian for failure to pay balance due ward after ward's majority is barred after six years from final account, but where no final account has been filed an action against the guardian is not barred. *Finn v. Fountain*, 217.

441(1). Action against sureties on note under seal is barred in three years after accrual of cause of action. *Furr v. Trull*, 417.

441(6), 2188. Guardian's payment of interest on sum due ward after ward's majority does not affect bar of a statute as to sureties on guardianship bond. *Finn v. Fountain*, 217.

445. Action against land to enforce decree for owelty accrues from date of judgment and is barred in ten years. *Aldridge v. Dixon*, 480.

446, 537. Employee accepting award under Compensation Act may not alone sue third person *tort feasor*. *McCarley v. Council*, 370.

451, 483(3). Method of service of process on persons adjudged insane. *Hood, Comr., v. Holding*, 451.

CONSOLIDATED STATUTES—*Continued.*

SEC.

451, 483(2). Judgment against minor not a party to action and whose interest was not presented to court is not binding on minor. *Wyatt v. Berry*, 118.

463(3), 469. Where allegations, if established would entitle plaintiff to foreclosure, action is removable to county in which land is situate, regardless of prayer for relief. *Mortgage Co. v. Long*, 533.

469, 1657, 1667. Wife may sue for alimony without divorce in county of her residence. *Miller v. Miller*, 753.

470. Motion for change of venue as a matter of right before time for filing answer has expired is made in apt time. *Mortgage Co. v. Long*, 533.

484. Affidavit for service by publication must show cause of action against defendant and that he has property in this State. *Martin v. Martin*, 157.

506. Motion to require separate allegation of causes is properly refused where complaint alleges one cause and several elements of damage. *Pemberton v. Greensboro*, 599.

534, 537. Court has discretionary power to strike out his orders for a bill of particulars and to require pleadings made more definite. *Temple v. Tel. Co.*, 441.

537. Motion to strike out amendment held properly allowed, the amendment not being responsive to order allowing its filing. *S. v. Oil Co.*, 123. Where no harm results to defendant from refusal of his motion to strike out, the judgment will be affirmed. As to whether the refusal affects a substantial right and is appealable, *quære? Pemberton v. Greensboro*, 599.

567. On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff. *Hobbs v. Kirby*, 238; *Keller v. R. R.*, 269; *Smith v. Assurance Society*, 387; *Moore v. Powell*, 636; *Dickerson v. Reynolds*, 770.

568. Where party admits facts sufficient to support judgment he waives right to trial by jury. *Bank v. Jones*, 648.

573(5). Mere denial of the duration and terms of an alleged trust is not plea in bar of reference of suit by the court. *Reynolds v. Morton*, 491.

591. Trial court may set aside verdict and order a new trial at any time during trial term. *Brantley v. Collie*, 229.

600. Findings held sufficient upon a liberal interpretation to support court's order setting aside judgment for surprise and excusable neglect. *Spell v. Arthur*, 405. Findings of fact by trial court upon appeal from order of clerk denying motion to set aside judgment are not reviewable when supported by competent evidence. *Kerr v. Bank*, 410. General counsel's failure to procure trial attorney is imputable to client. *Kerr v. Bank*, 410.

655. Formal judgment overruling demurrer is appealable, and lower court may not proceed in the cause pending the appeal. *Griffin v. Bank*, 253.

CONSOLIDATED STATUTES—*Continued.*

Sec.

791. Absolute judgment on forfeited recognizance under facts of this case held error. *S. v. Welborne*, 601.

836. Where replevin bond covers costs in court inferior to Superior Court plaintiff successful in suit may recover such costs on the bond. *Wright v. Nash*, 221.

898(a). Held not to apply in this case, provision that award must be made within certain time being waived. *Andrews v. Jordan*, 618.

900, 901. Fact that party could have proceeded under these sections does not make granting motions for bill of particulars and to make pleadings more definite improvident as a matter of law. *Temple v. Tel. Co.*, 441.

978(4). Contempt being criminal in its nature, the statutes must be strictly construed. *In re Hege*, 625. An order which is void *ab initio* may not be made the basis of contempt proceedings. *In re Foreclosure*, 488.

988. Parol contract to devise real estate comes within statute of frauds. *Grantham v. Grantham*, 363.

1164. Contract for the sale of stock need not be in writing. *Byrd v. Power Co.*, 589.

1186. Holders of one-fifth of total capital stock, whether common or preferred, may sue for dissolution for failure to earn dividends for three years, and whether dividends were earned will be determined in relation to total stock, common and preferred, and upon proper petition court may order corporation to file inventories. *Kistler v. Cotton Mills*, 809.

1489, 1490. Construed with chapter 126, Private Laws of 1931: *Held*, Greensboro Municipal Court has no jurisdiction to issue summons out of county in action within jurisdiction of magistrate. *Miles Co. v. Powell*, 30.

1525, 1526. Where principal is discharged in bankruptcy before final judgment, surety on stay bond is also discharged, and amendment of chapter 251, Public Laws of 1933, is prospective in effect. *Sutton v. Davis*, 464.

1664, 2241. Construing sections together it *is held*, upon separation custody of children may be determined by *habeas corpus*, but after divorce procedure is by motion in the cause, and agreement in deed of separation does not deprive court of its jurisdiction. *In re Albertson*, 742.

1667. Procedure to enforce judgment for reasonable subsistence is by motion in the cause and not by independent action. *Turner v. Turner*, 198.

1716. *Held*, parties waived right to preliminary hearing by commissioners by stipulation entered in the trial of the cause. *Myers v. Causeway Co.*, 508.

2180. Execution of note by guardian without approval of judge may be validated by order *nunc pro tunc*. *Powell v. Fertilizer Co.*, 311.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2242. In *habeas corpus* proceedings to determine custody of minor child either party may appeal. *In re Albertson*, 742.

2305. In determining whether contract is usurious, the courts will look to its substance and not its form. *Polikoff v. Service Co.*, 631.

2306. Findings in this case held sufficient to support judgment that plaintiff recover twice the amount of usury paid. *Polikoff v. Service Co.*, 631. Where party demands equitable relief of enjoining foreclosure he can enforce forfeiture only of interest in excess of legal rate. *Mortgage Corp. v. Wilson*, 493.

2306, 3038. Holder in due course may recover principal of note although payee withheld part thereof to avoid usury laws. *Bank v. Jones*, 648.

2314. Finding supported by evidence that Negroes were not unlawfully excluded from grand jury held conclusive. *S. v. Cooper*, 657.

2515, 1666. Judgment upon deed of separation held complete bar to application for alimony *pendente lite*. *Brown v. Brown*, 64.

2559, 2574. Action involving question of monopoly decided on question of procedure upon motion to strike out amendment to pleadings. *S. v. Oil Co.*, 123.

2616, 2618. Evidence of defendant's negligence in view of presence of small child on shoulders of highway held sufficient. *Moore v. Powell*, 636.

2621(47). Whether motorist's failure to stop at crossing was contributory negligence held for jury under evidence in this case. *Keller v. R. R.*, 269.

2621(77), (94). Whether parking of car on highway at night without lights is proximate cause of injury is ordinarily for jury. *Barrier v. Thomas and Howard Co.*, 425.

2707, 3846(ff). Irregularities in procedure for levying assessments for street improvements on either side of highway may be cured by validating act. *Crutchfield v. Thomasville*, 709.

2787(71), (31). City has power to provide by ordinance for proper regulation of its streets. *S. v. Carter*, 761.

2977. Surety on negotiable note is party primarily liable. *Dry v. Reynolds*, 571.

2978, 3168. Nature of instrument, customs and usuages, and facts of particular case determine reasonableness of time for presentment of check. *Raines v. Grantham*, 340.

3001. Administrator signing note in representative capacity under agreement may not be held personally liable thereon, nor may the estate be held liable thereon where note is signed purely for accommodation of makers. *Bank v. Vance*, 103.

3004. It is prima facie presumed that negotiable note is supported by consideration, and cancellation of deceased husband's note is sufficient consideration for widow's note given in lieu thereof. *Bank v. Harington*, 244.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3004. 3008, 3041, 1145. President of corporation has apparent authority to sign note for corporation, and secret limitation on his powers will not bind payee. *White v. Johnson and Sons, Inc.*, 773.

3044. Party endorsing note and guaranteeing payment may not show different liability by parol. *Carr v. Clark*, 265.

3051, 3102. Failure to present note does not discharge maker or sureties, and maker's maintenance of deposit sufficient to pay note at bank at which note was payable will not discharge maker or sureties, tender of payment discharging only parties secondarily liable. *Dry v. Reynolds*, 571.

3069. Where note is payable at certain bank it amounts to order to bank to pay same out of maker's deposit therein. *Dry v. Reynolds*, 571.

3101. Negotiable note may be discharged by any act which would discharge simple contract for payment of money, and payee's surrender of note to maker and acceptance of note of another person amounts to cancellation of first note. *Bank v. Oil Co.*, 778.

3106, 3107, 3047. Substitution of endorsers is material alteration releasing endorsers not consenting thereto, but not substituted endorser in absence of misrepresentation. *Efird v. Little*, 583.

3309. Trust agreement is not a conveyance of land nor an agreement to convey, and does not require registration. *Crossett v. McQueen*, 48.

3311. Provision that mortgage be registered in county of mortgagor's "residence" means actual residence and not domicile. *Discount Corp. v. Radecky*, 163.

3484. Whether act of railroad policeman is done as employee or officer of the law depends upon the nature of the act. *Tate v. R. R.*, 51.

3515. Finding that shipper tendered correct charges and that freight came within specified classification held conclusive, and the statute is constitutional, and cancellation of shipper's contract by purchaser because of shipper's refusal to accept goods for transportation held valid element of damages. *Corbett v. R. R.*, 85.

3561. Indexing of mortgage on lands owned by life tenant and remainderman in name of life tenant only held insufficient as against purchaser at foreclosure. *Woodley v. Gregory*, 280.

4139. Evidence of probate of will in common form is incompetent in caveat proceedings. *Wells v. Odum*, 110.

4200. Each party to conspiracy is guilty of murder in the first degree where one of conspirators commits the crime in furtherance of the conspiracy. *S. v. Bell*, 225. Evidence of defendant's guilt of murder in first degree held sufficient to be submitted to jury. *S. v. Ferrell*, 640.

4242. Evidence of defendant's guilt of wantonly and wilfully burning barn held sufficient. *S. v. Wilson*, 376.

4268. Parol evidence of agreement as to purpose for which agent should use money held competent in prosecution for embezzlement. *S. v. McClure*, 11.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4428. As amended by chapter 434, Public Laws of 1933, held constitutional. *S. v. Fowler*, 608.

4556(1). Fugitive from justice may be arrested on warrant of magistrate of this State, but is entitled to hearing before commitment to await extradition and may not be turned over to officers of demanding state prior to serving of proper extradition papers. *In re Mitchell*, 788.

4640. Court need not instruct jury as to lesser degrees of crime when all evidence shows that crime was first degree murder. *S. v. Ferrell*, 640.

4647. Construed with chapter 277, Public Laws of 1919, and chapter 233, Public Laws of 1931: *Held*, appeal from conviction of simple assault must be taken to recorder's court and not Superior Court. *S. v. Baldwin*, 174. Appeal from recorder's court is governed by same procedure as appeal from justice of the peace. *S. v. Goff*, 545.

5033. Violation of statute must be proximate cause of injury to employee in order to entitle employee to recover. *Williamson v. Box Co.*, 350.

5034. Employment of boy between 14 and 16 years old on duly issued certificate of welfare officer is not unlawful. *Williamson v. Box Co.*, 350.

6420. Under facts of this case mortgagee's interest in insurance held not forfeited by its failure to notify insurer of change of title. *Mahler v. Ins. Co.*, 692.

6465. Mailing of notice of next quarterly premium is not waiver of forfeiture for failure to pay extension note at maturity. *Sellers v. Ins. Co.*, 355.

7659. Classification of act by official charged with that duty is not conclusive. *Webb v. Port Com.*, 663.

7971(17), (18). Hospital organized as business corporation and charging a fixed schedule for patients held liable to taxes on its property although patients unable to pay were admitted as charity patients. *Hospital v. Rowan County*, 8.

7979(a), 7880(194). Where refund is ordered upon demand and notice without action, taxpayer is not entitled to interest on refund. *Cannon v. Maxwell, Comr.*, 420.

8028. Provides exclusive remedy of individual on tax certificate and limitation therein prescribed applies, and individuals may not seek to take advantage of fact that C. S., 7990, prescribes no limitation *Logan v. Griffith*, 580.

8037. Owners of land are barred by foreclosure of tax certificate in action in which they are served with summons, but mortgagee making appearance within six months from service by publication is not barred. *Street v. Hildebrand*, 208.

8081(1). Person employed by graded school district is employee of political subdivision of State and entitled to benefits of compensation act. *Perdue v. Board of Education*, 730.

8081(2), (f). Definition of accident "arising out of and in course of employment." *Ridout v. Rose's Stores*, 423.

CONSOLIDATED STATUTES—*Continued.*

SEC.

8081(u), (b). Evidence held to show that employer regularly employed less than five employees, and Commission's findings to contrary were not binding, and award is vacated and set aside. *Dependents of Thompson v. Funeral Home*, 801.

8081(bbb). Where Industrial Commission finds that review of award is sought more than twelve months from date of last payment on prior award, order denying further compensation will be affirmed. *Lee v. Rose's Stores*, 310. Claim of dependents for employee's death is not barred if filed within one year of employee's death. *Wray v. Woolen Mills*, 782.

8081(ppp). Findings of Industrial Commission are conclusive when supported by competent evidence, but not its conclusions of law. *Perdue v. Board of Education*, 730.

CONSPIRACY.

B Criminal Conspiracy. (Conspirator's guilt of crime committed by co-conspirator see Homicide B a 1.)

b Evidence

1. Criminal conspiracy may be shown by facts and circumstances pointing unerringly to that end. *S. v. Davidson*, 735.

CONSTITUTION, SECTIONS OF, CONSTRUED. (For convenience in annotating.)

ART.

I, sec. 7. Act allowing purchased claims for deposits in certain closed banks to be used at face value to pay debts to the banks affected held void as being an unlawful discrimination against depositors and creditors in closed banks not coming within the terms of the act. *Edgerton v. Hood, Comr.*, 816; *In re Trust Co.*, 822.

I, sec. 11. Witness may testify as to identifying marks on defendant's body. *S. v. Riddle*, 591.

I, sec. 11. Witness may testify to defendant's physical condition. *S. v. Eccles*, 825.

IV, sec. 8. The Supreme Court is confined to matters of law or legal inference upon appeal of a civil action. *Misskelley v. Ins. Co.*, 496.

IV, secs. 2, 14, 30. Legislature may delegate authority to elect judges of county courts to county commissioners. *Meador v. Thomas*, 142.

V, sec. 3. Provision that bonds of Port Commission of Morehead City should be exempt from taxation held valid. *Webb v. Port Com.*, 663.

V, sec. 5. Hospital not a charitable association nor its property used exclusively for charitable purposes held not exempt from taxation. *Hospital v. Rowan County*, 8.

VII, sec. 7. Bonds of Port Commission of Morehead City may be issued without a vote. *Webb v. Port Com.*, 663.

VII, sec. 7. *Held*, bonds in this case were issued for necessary municipal expenses as defined by courts, and vote of residents was unnecessary. *Starmount Co. v. Hamilton Lakes*, 514.

CONSTITUTION—*Continued.*

ART.

VIII, sec. 1. Inhibition applies only to private or business corporations, and act creating Port Commission of Morehead City held constitutional. *Webb v. Port Com.*, 663.

IX, sec. 3. Maintenance of school term is county expense, and it may issue bonds therefor in one of its school districts. *Evans v. Mecklenburg County*, 560.

CONSTITUTIONAL LAW. (Relation between the States: Full Faith and Credit see States A b; law of the forum see States A a; State's right to regulate intrastate commerce see Carriers B b 2; constitutional restrictions on taxation see Taxation A.)

B Governmental Branches and Powers.

a Legislative. (Legislative power to pass special act affecting corporations see Statutes A b; power to validate assessments see Municipal Corporations G h.)

1. Legislature is given power to create county courts and to provide for election of judge thereof, and it may delegate authority to county commissioners to find facts as to necessity of such courts and to elect judges thereof. *Meador v. Thomas*, 142.

E Obligations of Contract.

a Nature and Extent of Mandate in General

1. The constitutionality of C. S., 1186, providing for the dissolution of corporations in certain instances, cannot be successfully assailed in an action thereunder to dissolve a corporation organized subsequent to its enactment. *Kistler v. Cotton Mills*, 809.

F Right of Accused not to be Compelled to Testify Against Self.

a Scope and Effect of Provision in General

1. The constitutional guarantee that a defendant shall not be compelled to testify against himself, Art. I, sec. 11, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime. *S. v. Riddle*, 591.

2. An instruction that defendants had the right to testify or to decline to testify in their own behalf, and that their failure to testify should not be considered to their prejudice at any stage of the trial *is held* to be without error. *Ibid.*

3. The admission of incriminating testimony of defendant's physical condition by witnesses who examined her without objection does not violate defendant's constitutional right not to be compelled to give evidence against herself. Art. I, sec. 11. *S. v. Eccles*, 825.

G Privileges, Immunities and Discrimination.

b Racial Discrimination

1. Where upon a motion to quash a bill of indictment on the ground that defendant was a Negro and that the grand jury returning the bill of indictment and the trial jury were composed exclusively of white men and that persons of defendant's race who were qualified to serve as jurors were excluded from the jury list as prepared by the county commissioners, the findings of the trial court, after

CONSTITUTIONAL LAW G b—*Continued.*

hearing evidence, that the jurors were drawn, sworn and impanelled in accordance with the laws of this State, C. S., 2314, and that there was no discrimination against persons of defendant's race in making up the jury lists, are conclusive on appeal when supported by sufficient evidence, in the absence of gross abuse. *S. v. Cooper*, 657.

d Exclusive Emoluments and Privileges. (Case involving monopolies decided on question of procedure see Pleadings I a 1.)

1. Act allowing persons indebted to certain closed banks in certain designated areas to purchase claims for deposits in the banks affected and off-set such claims against their debts to the bank *held* unconstitutional as being an unfair discrimination against depositors and debtors of banks in other areas of the State and of banks within the designated areas not coming within the terms of the statute. Art. I, sec. 7. *Edgerton v. Hood*, 816; *In re Trust Co.*, 822.

I Due Process of Law: Law of the Land.

a Nature, Scope and Effect of Provisions

1. Federal Due-Process Clause does not prescribe State taxation in absence of arbitrary action. *Hotel Co. v. Morris*, 484.

CONTEMPT OF COURT.

A Acts Constituting Contempt.

a In General

1. A proceeding for contempt of court is *sui generis*, and though criminal in its nature, may be resorted to in civil as well as criminal matters, and the order attaching the defendant for contempt must be based upon evidence set out in the proceedings, together with the court's findings of fact and conclusions of law, and where the alleged contempt is the failure to comply with an order of court, it is especially necessary that it be found that such failure was wilful and unlawful, C. S., 978(4), and the statute, being criminal in its nature, must be strictly construed. *In re Hege*, 625.

b Wilful Disobedience of Valid Court Order

1. Where lands belonging to the separate estate of a wife are foreclosed under a duly executed deed of trust thereon, and rents are paid the wife after such foreclosure, an order issued upon motion of the person entitled to the rents by virtue of the foreclosure that the husband should pay into court the rents thus collected by the wife is void *ab initio*, and the husband may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one "lawfully issued." C. S., 978. *In re Foreclosure*, 488.

B Contempt Proceedings.

b Findings of Fact

1. Where the clerk of the court attaches an executor for contempt for failure to file a satisfactory accounting as ordered, and in the accounting filed there are controverted matters as to whether the executor had overpaid some of the beneficiaries while underpaying others, and as to whether the executor was entitled to certain commissions, or whether the failure of the executor was a wilful viola-

CONTEMPT OF COURT B b—*Continued.*

tion of the clerk's order for him to file a full and sufficient account, it is required that the clerk set forth the evidence with his findings and conclusions, and upon his failure to have sufficiently done so his order of commitment for contempt will be remanded to him for that purpose. *In re Hege*, 625.

CONTRACTS. (Specific performance of, see Specific Performance; contracts required to be in writing see Frauds, Statute of; contracts to devise see Wills B a.)

A Requisites and Validity.

b Parties, Offer and Acceptance

1. An offer and acceptance in the same terms are the foundations of an enforceable contract, and to this end the offer must be communicated and accepted in exact terms and same sense, for the necessary mutuality of agreement of the parties. *Dodds v. Trust Co.*, 153.

d Consideration

1. Any benefit, right or interest accruing to the promisor, or any forbearance, detriment or loss suffered or undertaken by the promisee is sufficient consideration to support a contract. *Bank v. Harrington*, 244.

F Actions for Breach.

a Parties Who May Sue

1. Plaintiff alleged that the defendant bank entered into an agreement with defendant warehouseman whereby the bank agreed to pay all checks issued by the warehouseman in the course of his business for the season in consideration of the warehouseman's execution of a note with an endorser to cover any overdraft in the warehouseman's account, that plaintiff was issued a check by the warehouseman in the course of business, and that the bank refused to pay the check. *Held*, the bank's demurrer to the action was properly sustained. The case of *Gorrell v. Water Supply Co.*, 124 N. C., 328, cited and distinguished. *Brantley v. Collie*, 229.

c Pleading, Evidence and Burden of Proof

1. While the injured party is under duty to use ordinary care to minimize the loss occasioned by the injuring party's breach of contract, the burden is on the injuring party to prove failure of the injured party to exercise such care. *Distributing Co. v. Seawell*, 359.

CORPORATIONS. (Disregard to corporate entity see Compromise and Settlement A b 1.)

D Stock.

e Purchase of its Stock by Corporation

1. Contract of solvent corporation to purchase its stock is valid. *Phillips v. Mercerizing Co.*, 843.

G Corporate Powers and Liabilities.

c Representation of Corporation by Officers and Agents

1. The act of a general manager of a corporation for a large territory in transferring a store manager from one of defendant's stores to

CORPORATIONS G c—*Continued.*

another of its stores within the territory and in fixing such store manager's compensation at the new post is binding on the corporation. *Stott v. Sears, Roebuck and Co.*, 521.

2. Where in a suit on a negotiable note against the corporate maker the payee introduces in evidence the note signed in the name of the corporation by its president, with one payment of interest thereon, and testifies that he had loaned the money to the corporation and received the note as evidence of the debt, the exclusion of evidence offered by defendant on the plea of *ultra vires* that the money was used by the president for a personal obligation and that he had no authority to sign the note for the corporation is not error, C. S., 3004, 3008, 3041, 1145, the president of the corporation having implied power to sign the note and secret limitations on his authority not being binding on plaintiff, and the corporation having placed its president in a position to mislead plaintiff and cause the loss, and the corporation having ratified the act by payment of interest. *White v. Johnson and Sons Co.*, 773.

K Dissolution and Forfeiture of Charter. (Banking corporations see Banks and Banking H.)

a Parties Who May Sue for Dissolution

1. Where a corporation has failed to earn four per cent on its total paid-in capital stock, it is not required that stockholders suing for its dissolution under C. S., 1186, should own one-fifth of its common stock in order to maintain the action, it being sufficient if they own common and preferred stock constituting one-fifth or more of the total paid-in capital stock of the corporation, common and preferred, and that they have owned such stock for a period of two years next preceding the institution of the action, and their right to maintain the action is not affected by the fact that holders of preferred stock are given no vote in the management of the corporation, the preferred stock being a part of the capital stock of the corporation, C. S., 1156, entitling the holders to all rights of stockholders subject to the terms and conditions on which their stock was issued. *Kistler v. Cotton Mills*, 809.

b Grounds for Dissolution

1. The fact that a corporation has earned net income sufficient to pay in good faith dividends on its preferred stock within three years prior to the institution of an action for its dissolution under C. S., 1186, is not sufficient to resist the action for dissolution if the earned dividends do not amount to four per cent on its total capital stock, preferred and common. *Kistler v. Cotton Mills*, 809.

f Procedure

1. Where the petition in an action for the dissolution of a corporation meets all requirements of C. S., 1186, it is not error for the court to require the defendant corporation to file inventories as provided by statute, and whether the court will order dissolution upon the final hearing is to be determined in its discretion according to whether, from all the facts shown, the failure of the corporation to earn the required dividends was due to temporary conditions or to its management. *Kistler v. Cotton Mills*, 809.

COUNTERCLAIMS see Set-off and Counterclaim; right to plead counterclaim see Pleadings C.

COUNTIES. (Liability of county commissioners to third persons see Public Officers C d; taxation see Taxation; courts see Courts B; schools see Schools and School Districts.)

E Fiscal Management, Debt and Securities.

b County Expenses

1. A county is an administrative unit of the State in our State-wide public school system, and under mandate of Art. IX, sec. 3, a statute requiring a county to maintain at least a six months school term in each of its school districts and to provide the necessary funds therefor by taxation or otherwise, is valid, and is specifically provided for in sec. 8 of the County Finance Act, and under the statutes a county is authorized to issue bonds necessary to the maintenance of the constitutional school term in one of its districts without the necessity of submitting the issuance of the bonds to a vote, and expenses necessary to the maintenance of the school term in a district include school sites, buildings, a necessary auditorium and shop for a technical high school, and sewage disposal plants, together with toilet facilities, necessary to the health of attending scholars in a rural school. *Evans v. Mecklenburg County*, 560.

COURTS. (Supreme Court see Appeal and Error; removal of causes see Removal of Causes.)

A Superior Courts.

c Jurisdiction on Appeals from Recorder's Courts. (In criminal cases see Criminal Law D b.)

1. Upon appeal from a recorder's court the jurisdiction of the Superior Court is derivative, and where it is not made to appear in the pleadings that the recorder's court had jurisdiction, the Superior Court obtains no jurisdiction. *Barham v. Perry*, 428.

2. Where an appeal is taken from a conviction in a recorder's court in a case within its jurisdiction, the jurisdiction of the Superior Court on appeal is derivative, and the defendants must be tried on the warrant as issued out of the recorder's court, and it is error for the Superior Court to try them on an indictment charging a different offense from that contained in the warrant, the discretionary power of the Superior Court to allow an amendment to the warrant being limited to amendments not effecting a change in the charge of the offense. The warrant in this case charged assault and battery on a female, and the indictment charged assault and battery inflicting serious injury. C. S., 4215. *S. v. Goff*, 546.

f Jurisdiction Upon Hearings or Motions After Orders or Judgments of Another Judge

1. A judgment sustaining a demurrer to the complaint for its failure to allege facts sufficient to constitute a cause of action is binding upon another Superior Court judge upon motion to strike out an amendment to the complaint filed under leave of the former judgment. *S. v. Oil Co.*, 123.

COURTS A f—*Continued.*

2. The doctrine of *res judicata* does not apply to ordinary motions incidental to the progress of a trial, and the court has the discretionary power to strike out an order made at a prior term requiring plaintiff to make his complaint more definite and certain or file a bill of particulars. *Temple v. Tel. Co.*, 441.

B County, Municipal and Recorder's Courts.

a Creation and Organization

1. The establishment of a General County Court by the board of commissioners of a county under the provisions of chapter 216, Public Laws of 1923, and section 2(24-a), Public Laws of 1924, will not be held invalid as being an unlawful exercise of legislative power, the jurisdiction of such courts being prescribed by the Legislature and the board of commissioners being clothed merely with the power to find the facts in regard to the necessity and expediency of such court, and their acts in establishing such courts having been ratified by the Legislature. *Meador v. Thomas*, 142.

2. Under the provisions of Art. IV, sec. 30, of our Constitution the Legislature is authorized to provide for the election of officers and clerks of General County Courts established by it, such courts being "other courts inferior to the Supreme Court" referred to in Art. IV, secs. 2 and 14, and the word "election" does not necessarily import a popular election by the qualified electors, and the delegation of the power to elect judges of the general county courts to the county commissioners is not an unlawful delegation of legislative power, and where such judge is elected by the commissioners upon a majority ballot it is immaterial whether their choice be called an appointment or election, the selection being made by the commissioners by ballot in accordance with the delegation of power to them. *Ibid.*

b Jurisdiction. (On appeal from conviction in justice's court see Criminal Law D b 1.)

1. The municipal court of Greensboro given the jurisdiction of a justice's court in civil actions on contract where the amount demanded does not exceed two hundred dollars exclusive of interest, chapter 126, Private Laws of 1931, has no jurisdiction to issue summons outside the county in an action embraced in the justice's jurisdiction when all the defendants reside outside the county, C. S., 1489, 1490, and this result is not altered by the provisions of chapter 126, section 34, Private Laws of 1931, the section being construed in relation to other sections, and C. S., 1489, 1490 not being specifically mentioned in chapter 126, and therefore retaining their vitality. *Miles v. Powell*, 30.

2. In an action brought in a court of limited jurisdiction plaintiff must make it appear in the pleadings that the action is within the jurisdiction of the court, and where he fails to do so a demurrer to the jurisdiction should be sustained even upon motion made after judgment upon appeal to the Superior Court, the defect not being remedial by verdict. *Barham v. Perry*, 428.

c Appeals

1. After an appeal from a recorder's court to the Superior Court has been effected and appeal bond given, the recorder's court has no

COURTS B e—*Continued.*

further jurisdiction over the case, and defendant appellant may not thereafter withdraw the appeal by notice given in the recorder's court, the procedure being the same as upon appeal from a justice of the peace, C. S., 4647. *S. v. Goff*, 545.

COVENANTS see Deeds and Conveyances C f.

CREDITORS' BILL.

A Nature and Requisites.

b Consolidation of Suits

1. *Held:* Summary proceedings under C. S., 356 should have been consolidated with creditors' bill. *Power Co. v. Yount*, 321.

CRIMINAL LAW.

D Jurisdiction and Venue.

b Degree of Crime and Appellate Jurisdiction

1. Appeal from conviction of simple assault must be taken to recorder's court under Public Laws, 1919, chap. 277, as amended, and not to Superior Court. *S. v. Baldwin*, 174.

2. On appeal from conviction in recorder's court Superior Court's jurisdiction is derivative and trial must be had on warrant. *S. v. Goff*, 546.

E Arraignment and Pleas.

a Arraignment

1. An arraignment in a criminal action is but the calling of the defendant to the bar of the court to answer the matter charged in the bill of indictment, and where the questions are asked by the solicitor in the presence of the judge with his consent and under his direction, the arraignment is not void on the ground that the questioning should have been conducted by the judge directly or by the clerk of the court. *S. v. Ferrell*, 640.

d Nolle Prosequi

1. The announcement of the solicitor, made before entering upon the trial, that the State would not ask for a verdict of more than murder in the second degree, is tantamount to taking a *nolle prosequi* on the charge of first degree murder. *S. v. Wall*, 659.

F Former Jeopardy.

b Attachment of Jeopardy

1. Jeopardy attaches to a defendant when he is placed on trial on a valid indictment before a court of competent jurisdiction after arraignment and plea and after the jury has been empaneled for the trial, and in this case the record, though indefinite, is held to sufficiently show that the defendant had been placed in jeopardy. *S. v. Bell*, 225.

d Same Offense

1. Where a defendant has been placed in jeopardy on an indictment charging conspiracy to burglarize a certain home and with burglariously robbing said home, and a judgment of not guilty entered, and thereafter the defendant is placed on trial on an indictment

CRIMINAL LAW F d—*Continued.*

charging conspiracy to commit murder and murder of the occupant of the home, who was killed by one of the conspirators in an attempt to commit the burglary or robbery, and it appears that both the attempted robbery and the murder arose out of the same transaction, and that the death of deceased occurred prior to the first indictment and that in so far as the defendant is concerned the same facts necessary to a conviction on the second indictment would have necessarily convicted him on the first, the defendant's plea of former jeopardy entered in the trial of the second indictment should have been heard by the court, the burden of proof on the plea being upon defendant. *S. v. Bell*, 225.

e Termination of Former Prosecution

1. Where defendant has effected an appeal from conviction in a recorder's court and has filed appeal bond, he may not withdraw the appeal in the recorder's court, and his plea of former conviction upon trial in the Superior Court, based upon conviction in the recorder's court and withdrawal of appeal therefrom by the recorder, is bad, the case being in the Superior Court for trial *de novo* on the charge contained in the warrant issued in the recorder's court. *S. v. Goff*, 545.

f Burden of Proof

1. The burden of proof on a plea of former jeopardy is on defendant. *S. v. Bell*, 225.

G Evidence. (Evidence in prosecutions for particular crimes see Particular Titles of Crimes; right of accused not to be compelled to testify against self, see Constitutional Law F.)

b Facts in Issue and Relevant to Issue

1. While ordinarily evidence of the commission by the defendant of offenses separate and distinct from the one on which he is being tried is incompetent, such evidence may be competent when it tends to show and is admitted for the purpose of showing defendant's guilty knowledge or for the purpose of identification, and in this case, in which defendant was charged with murder in an attempted robbery of a filling station to which defendant had driven in a car with certain companions identified as perpetrators of the attempted robbery, evidence that defendant had been riding around with the same companions and that they had committed several robberies, is held competent to show defendant's knowledge of the purpose of robbery and to establish his identity as the driver of the car. *S. v. Ferrell*, 640.

f Admissions

1. In this prosecution for wantonly and wilfully burning a barn, defendant's brother, in the presence of the officers, after looking at defendant's boot track found at the scene of the crime, charged defendant with having burned the barn, to which defendant made no reply: *Held*, the accusation was made under circumstances calling for a reply by defendant, and was competent evidence of defendant's guilt. *S. v. Wilson*, 376.

2. In order for a defendant's failure to answer an accusation of committing a crime or complicity therein to be competent in evidence

CRIMINAL LAW G f—*Continued.*

against him in a prosecution for such crime, it must be shown that defendant heard and understood the accusation, and that it was made under circumstances naturally calling for an answer, and that defendant had opportunity to act or speak, and defendant's silence must amount to an admission by acquiescence. *Ibid.*

3. It is not essential that the person accusing another of the commission of or complicity in a crime should be competent to testify against defendant in order for the undenied accusation to be competent against defendant where the circumstances are such as to naturally call for a denial by defendant, though the incompetence of the accuser as a witness may be a circumstance to be considered. *Ibid.*

i Expert and Opinion Evidence

1. Where in a criminal prosecution the defendant sets up the defense of insanity, the exclusion of testimony of a nonexpert witness, based upon observation of defendant, that defendant was insane at the time of the commission of the crime, is reversible error. *S. v. Keaton,* 607.

2. Whether a witness is an expert and competent to compare disputed handwritings is addressed to the sound discretion of the trial court, and his ruling thereon is not subject to review when supported by evidence. *S. v. Cofer,* 653.

q Testimony of Husband or Wife

1. In a prosecution for wilful abandonment testimony of the husband as to admissions or declarations of the wife made to him that she was pregnant at the time of their marriage, offered on the issue as to whether the abandonment was wilful, is incompetent, and in this case the husband obtained the benefit of this contention by other testimony admitted without objection. *S. v. Rowland,* 544.

I Trial. (Of particular crimes see Particular Titles of Crimes.)

j Nonsuit and Directed Verdict

1. Where the prosecuting witness testifies that he was robbed by the use or threatened use of firearms, and unequivocally identifies defendants as the perpetrators of the crime, their motion as of nonsuit is properly overruled. *S. v. Riddle,* 591.

k Verdict

1. Where the jury returns a special verdict on a statement of facts assented to by defendant, there is no reason to demand a general verdict on the same aspect of the case. *S. v. Evans,* 434.

J Motions for New Trial.

d Newly Discovered Evidence

1. A motion for a new trial for newly discovered evidence is addressed to the discretion of the trial court, and his refusal to grant the motion is not reviewable in the absence of abuse. *S. v. Riddle,* 591.

2. A motion for a new trial for newly discovered evidence may be made in the trial court only at the trial term or, in case of appeal, at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court, and where an appeal has been taken, the lower court is without authority to entertain the motion

CRIMINAL LAW J d—*Continued.*

pending the appeal, or if the appeal is abandoned the case is not alive for the hearing of such motion in the lower court. *S. v. Edwards*, 661.

L Appeal in Criminal Cases. (Appeals from magistrates' and recorders' courts see Criminal Law D b.)

a Prosecution of Case According to Rules of Court

1. Where an appeal in a capital case is not prosecuted as required by the Rules of Court the motion of the Attorney-General to docket and dismiss the appeal must be allowed, no error appearing on the face of the record proper. *S. v. Edwards*, 443; *S. v. Johnson*, 610.

b Appeals in Forma Pauperis

1. The clerk is without authority to allow defendant's application for appeal *in forma pauperis* in a criminal case where the statutory affidavit fails to aver that the application is made in good faith, or defendant's second application, intended to correct the deficiency in the first, is made more than five months after the adjournment of the term. *S. v. Pike*, 176.

d Record

1. Where the charge of the trial court is not in the record it is presumed correct. *S. v. McClure*, 11.

2. Where no entries of appeal appear in the record or in the clerk's certificate the Supreme Court acquires no jurisdiction. *S. v. Edwards*, 443.

3. The record on appeal imports verity. *S. v. Goff*, 545.

e Review

1. Defendant, having been accused by his brother of burning prosecuting witness's barn, under circumstances naturally calling for a denial, went to the home of the prosecuting witness and sought to engage him in conversation concerning the fire. While defendant and prosecuting witness were talking the prosecuting witness's three-year-old granddaughter made an accusation implicating defendant as the culprit. Defendant did not deny the accusation and left shortly thereafter. *Held*, the admission in evidence of the undenied accusation of the three-year-old girl was not prejudicial to defendant, it being merely cumulative of the competent undenied accusation of defendant's brother, and the jury having a full understanding of the circumstances under which the accusation was made, and being able to judge whether defendant's silence and abrupt departure were due to his inhospitable reception and the irresponsibility of his accuser. Whether the competency of an undenied accusation is exclusively a question of law for the Court, *quære? S. v. Wilson*, 376.

2. Where it does not appear of record what the testimony of witnesses would have been if they had been allowed to testify, exceptions to the exclusion of their testimony will not be considered. *S. v. Rowland*, 544.

3. No appeal lies from a discretionary determination of an application for a new trial on the ground of newly discovered evidence. *S. v. Riddle*, 591; *S. v. Edwards*, 661.

CRIMINAL LAW L e—*Continued.*

4. Court's ruling on question of whether witness is expert is not subject to review where ruling is supported by evidence. *S. v. Cofer*, 653.

5. Finding supported by evidence that Negroes were not unlawfully excluded from jury duty is conclusive. *S. v. Cooper*, 657.

6. Evidence held not prejudicial in view of withdrawal of charge of first degree murder and proof of killing with deadly weapon. *S. v. Wall*, 659.

7. Where a dying declaration of deceased meets all requirements of competency in that it was made when declarant was in actual danger of death and had full apprehension of that danger, and was made shortly prior to actual death of declarant, the exclusion of testimony offered for the purpose of impeaching the dying declaration, the declarant stated to the first person to reach her after she was shot, in response to his question as to what was the matter, that she was drunk, *is held* not prejudicial error where it appears that the excluded declaration was made an hour or so before the admitted dying declaration, and that the witness was allowed to testify that he smelled whiskey on declarant's breath. *S. v. Ham*, 749.

CROPS—Purchaser's right to, see Mortgages H m 2.

DAMAGES. (Law governing measure of, in transitory actions arising in another state see States A a 2; duty to minimize damages see Contracts F c; damages for breach of contract to convey see Wills B c.)

C Grounds for Recovery of Damages.

a Direct and Remote Injury

1. In an action to recover for the negligent killing of plaintiff's mules evidence that the loss of the mules resulted in a partial loss of plaintiff's crops is properly excluded as being of remote and speculative or conjectural damages. *Bullard v. Ross*, 495.

D Punitive Damages.

a Grounds Therefor

1. Where the assignee of a conditional sales contract signed by the purchaser of an automobile repossesses the car after default in the payment of the purchase price in accordance with the terms of the contract, but such repossession involves a civil trespass in that personal belongings of the purchaser were in the car at the time of the repossession, the purchaser in his suit for such trespass, although he may be entitled to compensatory damages, is not entitled to recover punitive damages. *Narron v. Chevrolet Co.*, 307.

DEATH.

B Actions for Wrongful Death. (Measure of damages on cause of action arising in another state, see States A a 2.)

a Limitation of Time for Bringing Action

1. The right of action to recover for wrongful death is conferred solely by statute, C. S., 160, and the provision therein that the action must be brought within one year from the date of death is a condition annexed to the cause of action and must be strictly observed, and allegations that defendants conspired together to prevent the

DEATH B a—*Continued.*

fact of death being known and that plaintiff administrator was not appointed until several years after intestate's death when the fact of his death was discovered, is not sufficient to overrule defendants' motion of nonsuit based on the fact that the complaint showed that the action was not brought within the time limit prescribed. *Curlee v. Power Co.*, 644.

d Evidence and Burden of Proof

1. In an action for wrongful death the burden is on plaintiff to establish by adequate evidence the death of the intestate, the defendant's negligence, and proximate cause. *Johnson v. R. R.*, 127.

DEDICATION see Highways D a 1.

DEEDS AND CONVEYANCES.

A Requisites and Validity.

a Consideration

1. The relationship between the parties is a good consideration for a deed executed by a father to his children, and his deed is valid where the rights of creditors or subsequent purchasers for value without notice are not involved. *Little v. Little*, 1.

B Registration and Priority.

b Instruments Requiring Registration

1. An agreement that the grantee should hold the property deeded in trust for himself and the other purchasers paying a proportionate part of the purchase price is a trust agreement and not a conveyance of or contract to convey land, and the trust agreement does not require registration as against the grantee's judgment creditors. C. S., 3309. *Crossett v. McQueen*, 48.

C Construction and Operation. (After acquired title see Estoppel A c.)

c Estates and Interests Created

1. A deed to "W., his lifetime and then to his heirs, if his heirs has no bodily heirs at their death the land returns back to" the grantor, with habendum clause "to said W., his lifetime and then to his heirs and assigns to their only use and behoof forever," with warranty clause in like tenor, conveys the fee simple title to W. by application of the rule in *Shelley's case*, which applies in this State as a rule of property as well as a rule of law. *Whitehurst v. Bowers*, 541.

f Conditions and Covenants

1. A father executed to certain of his children a deed containing a covenant that the grantees should support the grantor for the remainder of his life. After the grantor's death, plaintiffs, other children and grandchildren of the grantor, sought to set aside the deed for breach of the covenant. The grantor did not retain the right of reëntry and did not seek to rescind or cancel the deed during his lifetime. Plaintiffs did not allege that they had contributed anything to the support of the grantor. *Held*, plaintiffs could not complain of the breach of the covenant. *Little v. Little*, 1.

2. Deed to lot in development carried easements in streets and improvements but created no right to maintenance of improvements. *Dodds v. Trust Co.*, 153.

DEEDS AND CONVEYANCES C f—*Continued.*

3. Deed to A. and B. for life, each grantee covenanting to pay one-half the taxes and cost of repairs, *is held* to render A. liable for only one-half taxes and costs although B. reconveyed his interests back to the grantors. *Sanderson v. Sanderson*, 260.

4. There are no implied covenants with respect to title, quantity or encumbrance in the sale of real estate, and where a deed to property in fee simple does not contain a covenant of seizin the grantee may not maintain an action against his grantor for breach of covenant of seizin in that certain mineral rights in the land had been reserved by the grantor's predecessor in title and were not conveyed by the grantor's deed, though plaintiff might maintain an action under the principles announced in *Henofer v. Realty Co.*, 178 N. C., 584. *Guy v. Bank*, 357.

DEMURRER see Pleadings D.

DIVORCE.

D Jurisdiction and Proceedings.

a Jurisdiction and Venue

1. A wife who has been forced by her husband to leave his home at night and take refuge elsewhere may acquire a separate domicile, and may sue him for alimony without divorce in the county of her residence, and the husband is not entitled to removal to the county of his residence as a matter of right. C. S., 469, 1657, 1667. *Miller v. Miller*, 753.

E Alimony.

a Alimony Pendente Lite

1. Where the husband and wife execute a deed of separation in conformity with the statutes, C. S., 2515, 2516, 2529, and without coercion or undue influence, which provides for the transfer of certain real estate and personal property to the wife and in which they agree to live separate and apart from each other and to release each other from all property and other rights arising out of the marital relationship, and the deed of separation is approved by a consent judgment upon findings by the court that the terms of the deed of separation were not injurious to the wife and were fair and reasonable: *Held*, the consent judgment may be pleaded as a complete bar to the wife's application for alimony *pendente lite* and for reasonable counsel fees, C. S., 1666, in the wife's subsequent action for divorce *a mensa et thoro*, C. S., 1660, and an order denying the application for alimony and retaining the cause for trial upon the issue of the wife's right for divorce *a mensa* is not erroneous. *Brown v. Brown*, 64.

F Custody and Support of Wife and Minor Children.

a Jurisdiction of Court and Procedure

1. Construing C. S., 1664 and 2241 together it *is held* that where husband and wife have separated without being divorced the right to the custody of minor children may be determined by *habeas corpus* proceedings, but where the parties have been divorced and the decree does not award the custody of the children, the procedure to determine the right to their custody is by motion in the cause, and *habeas corpus* will not lie, and where in *habeas corpus* pro-

DIVORCE F a *Continued.*

ceedings a decree for absolute divorce between the parties is introduced in the record without objection, but the court makes no finding as to whether the parties had been divorced, but awards the custody of the child to its mother, on appeal the case will be remanded for a finding as to whether the parties had been divorced. *In re Albertson*, 742.

2. A deed of separation between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon granting a decree for absolute divorce in a suit brought subsequent to the deed of separation, from awarding the custody of the child in accordance with the statute. C. S., 1664. *Ibid.*

d Enforcement of Decree for Support or Alimony

1. Plaintiff sued her husband for reasonable subsistence under C. S., 1667, and the parties entered into a consent judgment, approved by the court, providing for the payment to the wife of a certain sum monthly and making such sums a lien upon the husband's real estate. The husband failed to make payments in accordance with the judgment and the wife brought a separate action alleging abandonment. *Held*, the husband's demurrer to the complaint in the second action was properly sustained. C. S., 511, the wife being remitted to the prior judgment. *Turner v. Turner*, 198.

"DOMICILE" see Divorce D a 1, Chattel Mortgages B b 1.

DOWER—Decree for owelty barred in ten years see Limitation of Actions A d; time from which statute runs see Limitation of Actions B a 4.

EASEMENTS.

A Creation.

d Easements Running With the Land

1. The purchaser of lands in a "model village" development project, while she may be a dominant tenant over the streets laid out and in respect to other improvements contemplated, cannot by her purchase acquire a right as against her grantor for the continuous maintenance and upkeep of the contemplated improvements in the absence of an express contractual agreement to that effect, and the provisions of the deed in this case excepting rights of way for water and sewer lines to the grantee were inserted for the protection of the grantee and did not constitute a contract for such maintenance. *Dodds v. Trust Co.*, 153.

EJECTMENT.

A Right of Action.

c Defenses and Counterclaims

1. Counterclaim for usury may not be set up in action in ejectment. *Mortgage Corp. v. Wilson*, 493.

C Pleadings and Evidence.

a Pleadings

1. Where in an action to recover possession of land plaintiffs set out in their complaint the deed under which they claim, they are bound by its contents. *Burroughs v. Womble*, 432.

ELECTION OF REMEDIES.

A When Election Must or May be Made.

d Between Action on Debt and Security Therefor

1. Creditor may elect to sue on original debt and return security given therefor. *Warren v. McLawhorn*, 360.

ELECTRICITY.

A Duties and Liabilities in Respect Thereto.

a In General. (Action for injury from fall in dark after power went off, see Negligence A e 2.)

1. In an action to recover for the wrongful death of plaintiff's intestate, who was burned to death in a fire occurring while intestate was a prisoner in a municipal stockade which was furnished with electricity by defendant, plaintiff may not recover even though it be conceded that the fire resulting in intestate's death was caused by a defect in the electrical equipment where all the evidence tends to show that defendant power company was under no duty to maintain or inspect the equipment. *Merritt v. Power Co.*, 259.

2. Power company wiring house and furnishing electricity may not be held liable for damages from fire originating from wiring where power company had no duty of inspecting or mantaining equipment. *Bradshaw v. Power Co.*, 850.

EMBEZZLEMENT.

B Prosecution and Punishment.

c Evidence

1. In this prosecution for embezzlement, C. S., 4268, the State introduced the written contract between defendant and prosecuting witness whereby defendant agreed to buy a lot and build a house thereon for prosecuting witness at a stipulated price, the lot not to cost over an amount named, and the prosecuting witness agreed to execute a note secured by deed of trust on other property for part of the contract price and to pay the balance upon completion of the contract. Defendant discounted the note and paid a much smaller sum on a contract to purchase the lot, but failed to pay the purchase price or to obtain title thereto. The State introduced oral testimony of prosecuting witness, over defendant's objection, tending to show that the parties agreed that the full proceeds of the note should be used to pay the purchase price of the lot. *Held*, the parol testimony was competent, it not being in contradiction of the written terms of the agreement, the written agreement containing no stipulation as to the specific application of the funds. *S. v. McClure*, 11.

EMINENT DOMAIN. (Appropriation of private property by city see Municipal Corporations E g.)

C Compensation.

e Elements and Measure of Compensation

1. Just compensation for the taking of lands includes all elements of damages, and where it is adjudged that defendant in condemnation proceedings was entitled to the amount reasonably expended for the construction of a drawbridge made necessary for the maintenance

EMINENT DOMAIN C e—*Continued.*

of defendants' franchises as public-service corporations by plaintiff's taking other lands of defendants for an inland water-way, an instruction that defendants were entitled to recover, as a part of the reasonable cost of constructing the bridge, the reasonable costs of necessary preliminary surveys, and interest on the amounts reasonably expended in the construction of the bridge from the time of their expenditure, *is held* without error. *Myers v. Causeway Co.*, 508.

D Proceedings to Take Land and Assess Compensation.

b Preliminary Hearings and Appraisals

1. Where it is stipulated by the parties in condemnation proceedings that a hearing before commissioners appointed by the clerk under the provisions of C. S., 1716, should be waived, and judgment is rendered determining the amount of damages, and on appeal the Supreme Court affirms the judgment as to the compensation allowed and remands the cause for error in the exclusion of another element of compensation to which defendants are entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation the parties are bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exception to the trial of the issue without such preliminary hearing will not be sustained. *Myers v. Causeway Co.*, 508.

c Evidence and Trial

1. In this condemnation proceeding it was adjudged that defendants were entitled to the amount reasonably required for the construction of a draw-bridge made necessary in order for defendants to maintain their franchises by plaintiff's taking of other lands of defendants for an inland water-way. Defendants introduced an expert witness who testified that certain expenditures made by defendants were reasonable in amount and necessary to the construction of the bridge: *Held*, the testimony was competent for the purpose for which it was offered, and even if it should be held incompetent, its admission would not constitute reversible error. *Myers v. Causeway Co.*, 508.

EQUITY. (Equitable remedies see Particular Titles of Remedies.)

A Principles of Equity in General.

b He Who Seeks Equity Must Do Equity

1. Where party demands equitable relief he can enforce forfeiture only of interest in excess of legal rate. *Mortgage Corp. v. Wilson*, 493.

ESTOPPEL.

A By Deed.

a Creation and Operation in General

1. Plaintiffs conveyed the land in question to E. S. for the term of her life and to J. S. for the term of his life, the grantees in the deed agreeing to pay taxes levied against the property and to keep the premises insured and repaired, the deed providing for reversion to the grantors upon breach of the agreement, and that E. S. should have all rents and profits from the land not actually occupied by the grantees. J. S. then conveyed his interests in the prop-

ESTOPPEL A a—*Continued.*

erty back to the grantors: *Held*, the grantors were estopped by their original deed from claiming any of the rents and profits from the property not actually occupied by the grantees and from denying that both the grantees were to pay the taxes and keep the property insured and in repair, and in their action to have the life estate of E. S. declared forfeited for breach of the agreement, E. S. was entitled to a judgment in her favor upon a showing that she had paid half the taxes and the cost of insurance and repairs, and to a judgment that she recover the amount paid by her for repairs and insurance above one-half the cost thereof. *Sanderson v. Sanderson*, 260.

c After Acquired Title

1. Title by estoppel will not prevail against purchaser without notice having prior registry—title acquired through independent source. *Bank v. Johnson*, 180.

B By Record or Judgment.

a Creation and Operation in General

1. Complaint held to state joint cause by plaintiffs, all parties plaintiff being estopped from bringing subsequent action. *Rodwell v. Coach Co.*, 292.

C Equitable Estoppel.

a Grounds and Essentials

1. Waiver is an intentional relinquishment of a known right, and knowledge of the right and intent to waive must be made plainly to appear. *Brady v. Benefit Asso.*, 5.

2. Where a lessee of a moving picture theatre, the plaintiff in the action, claims title to certain personal property as purchaser from a former lessee, evidence tending to show that he had told the lessor of the theatre, the defendant, that he was going to purchase the property from the former lessee, establishes a situation calling for an assertion of title thereto by the lessor, if any he has, and his failure to do so will estop him from claiming the property after the plaintiff has bought the property and paid for it, and the evidence in this case is held to support the trial court's instruction on this aspect of the case. *Greene v. Carroll*, 459.

3. The purchaser of stock is not estopped from bringing action on the seller's agreement to repurchase the stock at a fixed price upon demand by the purchaser by accepting dividends thereon after demand upon the seller to repurchase in accordance with the terms of the agreement, the purchaser being entitled to the dividends so long as he owns the stock. *Byrd v. Power Co.*, 589.

EVIDENCE. (Reception and withdrawal of evidence see Trial B; evidence in criminal cases see Criminal Law G.)

B Burden of Proof. (In particular actions see Particular Titles of Actions.)

a General Rules

1. The burden is on plaintiff seeking to recover certain articles of personal property to prove his title, but where he has made out a prima facie case of ownership by showing his purchase of the

EVIDENCE B a—*Continued.*

property from a third person, the burden of going forward with the evidence shifts to defendant to show the particular facts upon which he bases his claim of title, and under the facts of this case the court's use of the expression the "burden shifts" to the defendant is held not prejudicial, the court charging that the burden of the issue was on plaintiff. *Greene v. Carroll*, 459.

b Defenses

1. Burden of proof on affirmative defense is on defendant. *McPerson v. Williams*, 177.
2. Where the defense to an action upon a negotiable note is that the note was given solely for the accommodation of the payee and was not supported by consideration, the defendant's admission of the execution of the note makes a prima facie case that will take the case to the jury in the payee's action, but does not shift the burden to the defendant to establish his defense by the greater weight of the evidence, the burden of proof on the issue raised by the pleadings remaining on plaintiff throughout the trial. *Stein v. Levins*, 302.

D Relevancy, Materiality and Competency.

a In General

1. Where an action on a note is resisted by defendant solely on the ground that his name was forged on the note, evidence offered by him relating to consideration for the note is properly excluded as being irrelevant to the issue. *Pendleton v. Spencer*, 179.

f Impeaching and Corroborating Witness

1. Where plaintiff's testimoney as to the amount he was to receive under a contract of employment is directly challenged by testimony of defendant's general manager, letters written by plaintiff to officers of defendant company relative to the compensation agreed upon are competent in corroboration of plaintiff's testimony, and objections to their admissions on the ground that they contained self-serving declarations will not be sustained, the letters being admitted solely for the purpose of corroborating plaintiff's testimony and not as an admission by defendant of the matters therein contained. *Stott v. Sears, Roebuck and Co.*, 521.

E Admissions.

b By Parties

1. In a suit by the payee to recover upon negotiable notes an unaccepted offer of compromise made by the maker of the notes is not competent evidence as an admission of liability, nor is the statement of the amount offered as a compromise a statement of a fact independent of the rejected offer such as to render it competent as an admission. *Stein v. Levins*, 302.

H Hearsay Evidence.

c Declaration by Decedents Against Interest

1. The nieces and nephews of deceased filed a caveat to her will which was tried solely on the question of the mental capacity of testatrix. Caveators introduced in evidence a declaration of their deceased father, brother of testatrix, which had been entered of record in

EVIDENCE H c—*Continued.*

the public records in a certain county of another state and which set forth declarant's contention that he had not been paid his distributive share of his father's estate and which sought to preserve evidence thereof for the benefit of declarant's wife. The will devised the property formerly comprising the estate of testatrix's father. *Held,* the declaration was in the interest of declarant and was incompetent as hearsay evidence and was irrelevant to the issue of mental capacity involved in the trial, and its admission constituted reversible error. *In re Will of Hargrove,* 72.

d Declarations as to Birth and Relationships

1. In order for a declaration as to pedigree to be competent in evidence it is required that it be made *ante litem motam* and that the declarant be disinterested, and a declaration made by the father of caveators which in substance sets forth the declarant's contention that he had not been paid his distributive share of his father's estate and failing to identify caveators as his sons is held incompetent to prove blood relationship in caveators' action to set aside the will of their father's sister disposing of property formerly comprising the estate of testatrix's father. *In re Will of Hargrove,* 72.

e Testimony of Employees or Agents as to Declarations of Principal Against Interest

1. In an action by the assignee of a lease against the lessor to recover certain lamps and equipment used in a moving picture theatre, the assignee claimed title by purchase from the lessee, and the lessor claimed that the lamps had been substituted for the original fixtures by the lessee and that by agreement title thereto remained in the lessor: *Held,* testimony of a former employee of the lessor as to a conversation between the lessor and the lessee in which the lessee admitted title in the lessor is incompetent as hearsay, and was properly excluded. *Greene v. Carroll,* 459.

J Parol Evidence Affecting Writings.

a General Rules Governing Admissibility

1. Parol evidence is competent to show that a contract not required to be in writing was partly written and partly oral, and parol testimony of the unwritten part is competent if not contradictory to the written terms. *S. v. McClure,* 11.

2. Plaintiff brought action for the breach of an agreement alleged to have been entered into by the parties during their negotiations for a lease of defendant's property, the agreement providing that defendant should not lease any other portion of the property for use in the business in which plaintiff was engaged. The alleged agreement was not included in the written terms of the lease contract. *Held,* in the absence of allegations of fraud or mutual mistake, evidence of the alleged agreement was incompetent as parol evidence in contradiction or variance of a written contract, it being presumed that the parties included in the written contract all provisions by which they intended to be bound. *Sakellaris v. Wyche,* 173.

3. Parol evidence at variance with the terms of a written contract is incompetent. *Sherrill v. Graham County,* 178.

EVIDENCE J a—*Continued.*

4. Party endorsing note and guaranteeing payment may not show different liability by parol. *Carr v. Clark*, 265.

5. As between original parties it may be shown by parol that parties signed as sureties and not comakers. *Furr v. Trull*, 417.

6. Parol evidence that the agent of a corporation for the purpose of selling its stock was expressly authorized and directed to tell proposed purchasers that if they would buy stock the corporation would repurchase it at any time upon the purchaser's demand at a certain price, and that plaintiff purchaser bought the stock upon this agreement, *is held* admissible in evidence although no such agreement was contained in the written stock subscription contract signed by the purchaser, it not being required that a contract for the sale of stock should be in writing, C. S., 1164, and the parol part of the contract not being in contradiction of the written terms. *Byrd v. Power Co.*, 589.

7. Payee's surrender of note to maker and acceptance of another note amounts to cancellation not requiring writing, and parol evidence thereof is competent. *Bank v. Oil Co.*, 778.

K Expert and Opinion Testimony. (In criminal cases see Criminal Law G i.)

a Conclusions and Opinions in General

1. Where the determinative question in an action is whether the intervener is the purchaser of a draft or an agent for its collection, testimony of the intervener's agent that it was a purchaser is properly excluded as invading the province of the jury, and the facts relating to the intervener's acquisition of the paper not being in dispute, such testimony is also incompetent as being a mere conclusion of the witness. *Denton v. Milling Co.*, 77.

2. Testimony of physician that insured was not permanently disabled held not conclusive. *Misskelley v. Ins. Co.*, 496.

3. Expert testimony as to whether taking of lands necessitated construction of bridge in order to maintain franchise and as to reasonableness of expenditure therefor held competent. *Myers v. Causeway Co.*, 508.

N Weight and Sufficiency.

c Credibility

1. Where one witness testifies that he heard defendant's train sound its whistle, and another witness testifies that he was in a position to have heard such signal had it been given, and did not hear the whistle, the affirmative testimony is ordinarily more reliable than the negative, but such testimony is some evidence that the whistle was not blown. *Johnson v. R. R.*, 127.

EXECUTION.

B Property Subject to Execution.

d Intervention of Equitable Rights of Third Persons in Property of Judgment Debtor

1. Plaintiffs alleged that they were purchasers of certain land with one of defendants, that deed was made to him and that he took posses-

EXECUTION B d—*Continued.*

sion of the land as trustee for himself and plaintiffs as tenants in common under a contemporaneous agreement between the parties, each having paid one-fourth the purchase price, that the trust agreement was in writing but was not registered until after the docketing of the other defendants' judgments against the grantee defendant, that the deed to the grantee defendant failed to describe him as "trustee" through the mutual mistake of the parties or the draftsman, that the grantee defendant executed a registered mortgage on his one-fourth undivided interest and that the mortgage was foreclosed and his interest purchased at the sale by plaintiffs. *Held,* the trust agreement was not a conveyance of or a contract to convey land, C. S., 3309, and did not require registration as against creditors, and upon demurrer of defendant grantee's judgment creditors, plaintiffs were entitled to reformation of the deed, and the judgment creditors whose judgments were docketed prior to the execution of the mortgage were entitled to a lien only upon defendant grantee's one-fourth interest in the land, and the judgment creditors whose judgments were docketed subsequent to the execution of the mortgage were not entitled to any lien upon the land. *Crossett v. McQueen,* 48.

F Time Within Which Execution Must be Completed.

a Life of Judgment for Purpose of Execution in General

1. The issuing of execution on a decree charging owelty in partition is barred by the ten-year statute of limitations, the lien upon lands of a docketed judgment being barred after the lapse of ten years from the date of docketing, and the bar of the statute is unaffected by the beginning of an execution which is not completed by sale prior to the expiration of the ten years, an execution adding nothing to the life of the lien of the judgment. *Hyman v. Jones,* 266.

K Execution Against the Person.

a Grounds and Requisites

1. Where judgment is rendered in an action for malicious prosecution and abuse of process by default and inquiry, execution against the person of defendant may not be had upon the verdict of the jury upon the issue of damages, an affirmative finding by the jury of actual malice being necessary for execution against the person on the first cause of action, and wilful abuse of process being necessary on the second. *Klander v. West,* 524.

EXECUTORS AND ADMINISTRATORS.

C Control and Management of Estate.

a Supervision and Control of Courts

1. Equity has the power to appoint a receiver for the estate of a decedent in a pending action, and such receiver may thereafter maintain an action against the executor and others to recover for misapplication of funds and to recover funds so misapplied. *Bundy v. Marsh,* 768.

c Power of Executor or Administrator to Bind Estate

1. Estate held not liable on note signed by administrator purely for accommodation of makers. *Bank v. Vance,* 103.

EXECUTORS AND ADMINISTRATORS C c—*Continued.*

2. Ordinarily executor cannot bind estate by brokerage contract to sell at fixed price. *Harris v. Trust Co.*, 526.

D Allowance and Payment of Claims. (Limitation of actions on, see Limitation of Actions B f; liability of devisee for, see Wills F i.)

b Claims for Services Rendered Deceased

1. Promisee performing services may recover upon *quantum meruit* in action on unenforceable contract to devise. *Grantham v. Grantham*, 363.

e Priorities

1. A docketed judgment against the lands of a deceased comes within the fifth class enumerated by the statute prescribing priority, C. S., 93, and, unless made so by its terms, is not such a "specific lien on property" as to bring it within the first class enumerated by the statute. *Stewart v. Doar*, 37.

2. The owner of land executed a note with sureties for his taxes in order to prevent the foreclosure of the tax liens, and the unsigned tax receipts were detached from the record and attached to the note. After the landowner's death his administrator renewed the note with the same sureties. The sureties were required to pay the note and the sheriff paid the proceeds thereof to the county in settlement of the taxes. The estate was insolvent and the land was sold to make assets. The sureties claimed priority of payment out of the assets of the estate, alleging that it was agreed between the parties that they were to be subrogated to the rights of the sheriff in the event they were required to pay the note: *Held*, the tax lien was lost or rendered unenforceable as against other creditors of the estate, and the sureties were not entitled to priority. *Callahan v. Flack*, 105.

3. The priority of payment of the debts of a decedent is determined by C. S., 93, and a specific lien against the lands of decedent by registered mortgage is placed in the first class, and taxes assessed at the death of the decedent are placed in the third class, and where the lands have been foreclosed and bought in by the mortgagee who pays the taxes, and there is a deficiency after the application of the purchase price to the mortgage debt, a complaint setting forth these facts in an action by the mortgagee to subject the other lands of the decedent to the payment of the deficiency and taxes states a good cause of action, and defendant administrator's demurrer thereto should be overruled, and the rule that taxes assessed at the death of decedent come within the third class for payment is not affected by the provisions of C. S., 7980, requiring that taxes assessed against the property should be paid from the proceeds of foreclosure sale. *Fertilizer Co. v. Bourne*, 337.

G Accounting and Settlement.

a Duty to Account and Compelling Accounting

1. An executor is required to file an annual accounting of the decedent's estate, C. S., 105, with the right of the interested parties to file a suit in equity to surcharge and falsify the account, C. S., 135, or, upon a shortage in the estate, the executor may be prosecuted for embezzlement, C. S., 4268, and the clerk of the court can

EXECUTORS AND ADMINISTRATORS G a—*Continued.*

order the executor to file an annual accounting, and upon his wilful failure to do so, or his filing of an insufficient and unsatisfactory account and his wilful refusal to file a full and satisfactory account within twenty days after the clerk's order to do so, he may be attached by the clerk for contempt, upon a proper showing, C. S., 106, and committed until he complies with the clerk's order, or the clerk may remove him. *In re Hege*, 625.

"EXPLOSION" see Negligence A e 1; Insurance R a 1.

EXTRADITION.

A Proceedings and Formal Requisites.

d Arrest on Warrant of Justice of the Peace of this State

1. Where a justice of the peace of this State issues a warrant for the arrest of a person based upon an affidavit that such person was a fugitive from justice from another state, and the warrant is regular and valid, N. C. Code of 1931, 4556(1), in *habeas corpus* proceedings instituted prior to a hearing upon the warrant before the justice of the peace, an order remanding the petitioner to the custody of the sheriff who had arrested petitioner is not error, but petitioner is entitled to a hearing before the justice of the peace before he is committed to await the issuance of an extradition warrant. *In re Mitchell*, 788.

2. A person arrested upon a warrant of a justice of the peace of this State, issued upon an affidavit that such person was a fugitive from justice from another state, N. C. Code of 1931, 4556(1), may not be lawfully delivered to the authorities of such other state until the Governor of this State has honored a requisition for such person from the Governor of such other state. *Ibid.*

FALSE IMPRISONMENT—Malicious imprisonment without probable cause upon valid warrant see Malicious Prosecution.

FALSE PRETENSE—Issuing worthless checks see Bills and Notes D f.

"FAMILY CAR DOCTRINE" see Automobiles D c.

FEDERAL COURTS—Removal of causes to, see Removal of Causes.

FIXTURES.

B Right to Remove.

a In General

1. What constitutes a "trade fixture" removable by the tenant upon the expiration of the term of his lease, either as a matter of right or by special agreement, is to be determined by the facts of the particular case. *Springs v. Refining Co.*, 444.

2. The right of a tenant to remove trade fixtures upon the expiration of the lease between the parties is governed by a more liberal rule than the one determining the right of a mortgagor or vendor to fixtures and improvements upon land. *Ibid.*

3. In an action by a lessor to restrain the lessee's assignee from removing improvements, the allegations in the assignee's answer that it was the owner of the property in dispute and had the right of removal, ordinarily entitles the assignee to show such right if it can. *Ibid.*

FIXTURES B a—*Continued.*

4. Where an assignment of a lease is made with the knowledge and consent of the lessor, the assignee takes under the original lease and has the same rights in regard to the removal of fixtures as his assignor. *Ibid.*

c Exercise of Right Prior to Termination of Lease

1. The trend of our decisions is to the effect that a tenant does not lose his right to remove trade fixtures by failing to remove them before the expiration of the term of the original lease between the parties where a renewal lease is executed by the parties, although the renewal lease contains no reservation of the right of removal, especially if the lessee can show the intention of the parties to allow such removal upon the expiration of the second lease. *Springs v. Refining Co.*, 444.

FOOD.

A Liability of Manufacturer for Injuries to Consumer.

a Deleterious and Foreign Substances

1. Evidence tending to show that plaintiff bought from a local retailer plug tobacco manufactured by defendant, and that plaintiff while on his way home from the store, bit the tobacco and was injured by a fish-hook which stuck through his lip, that all of the paper wrapper had not been removed from the tobacco, which had recently come from the store, and that the inside of the plug showed the imprint of the fish-hook, that other foreign substances had been found in the same brand of tobacco manufactured by defendant within two months preceding the injury, and that the foreman in defendant's plant had previously had complaints that other foreign substances had been left in the tobacco, *is held* sufficient to overrule defendant's motion of nonsuit, the evidence being sufficient to prove circumstances from which a reasonable inference of negligence could be drawn without invoking the doctrine of *res ipsa loquitur*. *Corum v. Tobacco Co.*, 213.

2. While plug tobacco is not a food it is an article manufactured for consumption by an ultimate consumer, and is capable of inflicting serious physical injury when foreign and deleterious substances are allowed to become embedded therein, and it comes within the rule that a manufacturer of food or drink is liable for injuries caused the ultimate consumer by reason of foreign or deleterious substances negligently left in the manufactured article. *Ibid.*

FORMER JEOPARDY see Criminal Law F.

FRAUD—Cancellation of deed to city for, see Municipal Corporations F e.

FRAUDS, STATUTE OF.

B Contracts Affecting Realty.

b Contracts to Convey

1. Parol contract to devise real estate comes within statute of frauds. *Grantham v. Grantham*, 363.

E Application of Statute in General.

c Executed Contracts

1. Performance on the part of the promisee does not take an oral contract out of the provisions of the statute of frauds. *Grantham v. Grantham*, 363.

FRAUDS, STATUTE OF E c—*Continued.*

2. A contract to devise real property comes within the provisions of the statute of frauds, and performance of services by the promisee as consideration for the contract does not take the contract out of the provisions of the statute, and the promisee cannot successfully maintain an action for specific performance of the contract. C. S., 988. *Ibid.*

F Procedure to Take Advantage of Statute and Waiver of Plea.

b Necessity of Objecting to Evidence of Parol Agreement

1. In a suit for specific performance of a parol contract defendant does not waive his defense of the statute of frauds by failing to object to the admission of evidence relating to the alleged contract where defendant has denied the execution of the alleged contract, such denial extending to the right to specific performance, and defendant being entitled to admit the contract in evidence and plead the bar of the statute, the defendant not denying that plaintiff was entitled to some relief on the contract. *Grantham v. Grantham*, 363.

GAMBLING.

B Prosecution and Punishment.

d Evidence

1. Chapter 434, Public Laws of 1933, amending C. S., 4428, which makes the possession of tickets, etc., used in the operation of a lottery prima facie evidence of violation of the section, is constitutional and valid, the presumption being a rational one, and *held further*, under the presumption, the evidence of guilt of one of the defendants was sufficient to be submitted to the jury, but as to the other the evidence was insufficient, and as to him the demurrer to the evidence is sustained. *S. v. Fowler*, 608.

GIFTS.

A *Inter Vivos.*

a Requisites

1. A bank deposit made by a husband and entered on the records of the bank in the name of the husband or wife does not constitute a gift *inter vivos* to the wife, there being no delivery to the wife or loss of dominion over the property by the husband, and a title to the deposit remains in the husband, the wife having only the right to draw thereon as his agent, and upon his death her power of agency is revoked, and his administrator is entitled to the deposit to be distributed as an asset of the estate. *Nannie v. Pollard*, 362.

GUARANTY. (Surety contracts see Principal and Surety.)

B Construction and Operation. (Bonds to secure rent see Landlord and Tenant H c.)

b Rights and Liabilities Between Creditor and Guarantors

1. The creditor received payment from the debtor and applied same to the debtor's unsecured note and not to the debt guaranteed by defendants. *Held*, as between the creditor and the guarantors the creditor had the right to so apply the payment. *Midland Co. v. Glass Co.*, 763.

GUARDIAN AND WARD. (Guardianship of insane persons see Insane Persons C.)

C Custody and Care of Ward's Person and Estate. (Limitation of liability of sureties on guardian's bond see Limitation of Actions C a 2; limitation on guardian's liability see Limitation of Actions B a 1.)

b Control and Management of Estate

1. A guardian executed a note and deed of trust under an order made by the clerk without the approval of the judge. The judge later approved the order *nunc pro tunc*. *Held*, the defect was cured. C. S., 2180. *Powell v. Fertilizer Co.*, 311.

HABEAS CORPUS.

A Nature and Grounds of Remedy.

c To Determine Right to Custody of Minor Children

1. Upon separation custody of children may be determined by *habeas corpus*, but after divorce procedure is by motion in cause. *In re Albertson*, 742.

B Proceedings.

e Appeals

1. In *habeas corpus* proceedings for the custody of a minor child either party may appeal to the Supreme Court from final judgment. C. S., 2242. *In re Albertson*, 742.

HIGHWAYS. (Contractors' bonds for construction of, see Principal and Surety B d; negligent driving on, see Automobiles C.)

A State Highway Commission.

c Highway Ordinances

1. The word "park" as used in regulations of motor vehicles means allowing such vehicles to remain standing on a public highway or street while not in use. *S. v. Carter*, 761.

D Obstructing Highways.

a Right of Individual to Bring Action for Damages

1. Evidence of dedication of a road, as widened, and its obstruction by defendant and special injury resulting to plaintiff is sufficient to take the case to the jury in an action for a mandatory injunction and damages for wrongful obstruction. *Russell v. Garner*, 791.

HOMICIDE.

B Murder.

a In the First Degree

1. Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. C. S., 4200. *S. v. Bell*, 225.

E Justifiable and Excusable Homicide.

a Self-Defense

1. Evidence that defendants and deceased engaged in a fight about 6:30 o'clock in the evening, the defendants being armed and the deceased unarmed, and the deceased then went to another's house and secured a gun, and that deceased met defendants that night about

HOMICIDE E a—*Continued.*

9:15 on a path near the scene of the first encounter, and that both defendants and deceased fired shots, one of the defendants firing the shot resulting in deceased's death, *is held* sufficient to be submitted to the jury and to sustain a conviction of second-degree murder, the defendants' plea of self-defense being for the determination of the jury under correct instructions from the court, and *held further*, defendants' exceptions to the admission of evidence of the fight earlier in the evening cannot be sustained, such evidence being helpful to them on their pleas of self-defense. *S. v. Bailey*, 255.

G Evidence.

b Presumptions and Burden of Proof

1. An intentional killing with a deadly weapon raises presumptions that the killing was unlawful and was done with malice, constituting murder in the second degree. *S. v. Bailey*, 255.

d Competency and Admissibility in General

1. Where the evidence shows that defendant killed deceased with a deadly weapon, and the State has taken a *nolle prosequi* on the charge of first degree murder, the admission of testimony tending to show premeditation or malice on the part of defendant cannot be held for reversible error, since the element of premeditation had been withdrawn from the consideration of the jury, and malice and unlawfulness of the homicide were presumed from the intentional killing with a deadly weapon. *S. v. Wall*, 659.

2. The introduction in evidence of deceased's bloody clothes in a prosecution for homicide cannot be regarded as harmful or erroneous, they being competent proof of a fact in question and being merely stronger proof than oral evidence. *Ibid.*

e Weight and Sufficiency of Evidence

1. Evidence of guilt of second-degree murder held sufficient, defendants' pleas of self-defense being for the jury. *S. v. Bailey*, 255.

2. Evidence tending to show that the defendant on trial for a homicide drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station and held up the proprietor at the point of pistols, that deceased was with the proprietor in the building, that the proprietor dodged and went into an adjoining room, armed himself with a pistol and shot gun, and pointed the pistol at his assailants through a crack in the door, whereupon the two robbers ran out, and that deceased was then killed by a shot from a gun fired from the outside, and that after the firing of the fatal shot, the proprietor ran to the window and fired his gun after the automobile in which the robbers were fleeing, is held sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. C. S., 4200. *S. v. Ferrell*, 640.

3. Evidence of defendant's guilt of unlawful homicide held sufficient to overrule her motion for judgment as of nonsuit. *S. v. Eccles*, 825.

H Trial.

c Instructions

1. Where upon the trial for murder all the evidence tends to show that if the defendant is guilty, he is guilty of the crime of murder in the

HOMICIDE H c—*Continued.*

first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error. *S. v. Ferrell*, 640.

HUSBAND AND WIFE. (Divorce and Alimony see Divorce; consideration for widow's note given in exchange for deceased husband's see Bills and Notes A a 1; husband's liability for injury to wife driving his car see Automobiles E b 1; rights in joint deposit see Gifts A a 1.)

B Privileges and Disabilities of Coverture. (Testimony by one for or against the other see Criminal Law G q.)

c Estates by Entireties

1. Deed to husband and wife solely to effect partition to husband does not create estate by entireties. *Burroughs v. Womble*, 432.

2. Where a devisee under a will is put to her election to take the land devised and relinquish to her cotenant her title as tenant in common in other lands, and the devisee elects to take the land devised, and as evidencing her intent to so elect, executes a quit-claim deed to her cotenant and the husband of the cotenant, the cotenant takes the whole tract of land in fee under the will notwithstanding the language of the quit-claim deed to her and her husband, and not as a tenant by the entireties, and where, upon her death intestate, the lands are partitioned among her children as her heirs at law, they take the lands allotted to them in fee subject to the life estate of the husband, and free from any disposition of the lands the husband may seek to make by will. *Burrowes v. Franks*, 456.

D Wife's Separate Estate.

b Rights and Liabilities of Husband in Regard Thereto

1. Where lands belonging to the separate estate of a wife have been foreclosed under a deed of trust thereon duly executed, and after such foreclosure the rents from the land are paid to the wife, the husband may not be held responsible for such rents by the person entitled to the rent by virtue of the foreclosure, since, under our Constitution, Art. X, sec. 6, a wife is given sole ownership of her separate estate. *In re Foreclosure*, 488.

G Abandonment.

d Trial and Judgment

1. Where defendant admits that he abandoned his wife, and the evidence is conflicting as to whether such abandonment was wilful, the case is properly submitted to the jury in a prosecution for wilful abandonment. *S. v. Rowland*, 544.

2. In prosecution for abandonment testimony of husband that wife had admitted pregnancy at time of marriage is incompetent. *Ibid.*

INDICTMENT.

C Motions to Quash or Dismiss.

d For Improperly Constituted Grand Jury

1. Motion to quash on ground that Negroes were not allowed to serve on grand jury held properly denied upon finding that there had been no discrimination in selection of jury. *S. v. Cooper*, 657.

INDUSTRIAL COMMISSION see Master and Servant F.

INFANTS—Consent judgments against, see Judgments K a 1, K d 1.

INJUNCTIONS.

B Grounds for Injunctive Relief.

e To Prevent Enforcement of Ordinances or Statutes on Ground of Invalidity

1. This case *is held* to be controlled by the general rule that equity will not interfere by injunction to test the validity of a municipal ordinance and does not come within the exception that equity will enjoin a threatened enforcement of an alleged unconstitutional law when it is made manifest that otherwise irreparable injury will result to property or personal rights. *Flemming v. Asheville*, 765.

D Preliminary and Interlocutory Injunctions.

b Continuing, Modifying or Dissolving

1. An injunction will ordinarily be continued to the hearing where serious controversy exists, and dissolution may cause great injury to plaintiff and continuance result in no harm to defendant. *Holder v. Mortgage Co.*, 207; *Ferebee v. Thomason*, 263; *Teeter v. Teeter*, 438.

2. Where upon the return of a temporary restraining order the pleadings and evidence raise serious issues of fact, which, if established, would entitle plaintiff to the permanent injunction demanded, the temporary order will ordinarily be continued to the hearing. *Springs v. Refining Co.*, 444.

3. The owner leased certain land as a filling station site, the lessee being authorized to build a filling station thereon, and the lease providing that the lessee should have the right to remove filling station and fixtures upon the expiration of the term of the lease. The lessee constructed the filling station and subsequently assigned the lease and sold the filling station to defendant, and at the expiration of the term of the lease the lessor executed a renewal lease to the assignee, containing like provision for removal of the building and fixtures but no reservation or the right to remove fixtures placed on the land during the life of the first lease. At the expiration of the term of the second lease the lessor obtained a temporary order restraining the lessee in the second lease, the assignee of the first lease, from removing the building and fixtures. The defendant filed answer setting up title to the filling station and fixtures, and asserting the right to remove them as trade fixtures. Upon the return of the temporary restraining order it was made permanent: *Held*, the temporary order should have been continued to the hearing, and the order of the court making it permanent without a hearing was error. *Ibid.*

INSANE PERSONS.

C Guardianship.

d Actions

1. The guardian of a lunatic brought action to have certain funds lost on account of the insolvency of his bank of deposit declared a

INSANE PERSONS C d—*Continued.*

credit to the lunatic's estate, alleging that the loss of the funds was not occasioned by negligence. Defendants answered denying this allegation, and moved that the surety on the guardian's bond be made a party. *Held*, the answer failed to allege a breach of the bond and the surety was a proper party at most, and the motion for its joinder was addressed to the discretion of the court, and the court's action in refusing the motion is not reviewable. *Marriner v. Mizzelle*, 204.

I Actions.

a Service of Process on

1. Where a person has been judicially declared insane service of summons in an action against him may be made by delivering a copy of the summons to his committee or guardian and to him personally, or if no committee or guardian has been appointed, service may be made on him personally or returned without service with the statutory endorsement, but in no event can final judgment be rendered against him without adequate notice to his committee or guardian, or to his guardian *ad litem* duly appointed by the court. C. S., 451, 483(3). *Hood v. Holding*, 451.

d Validity of Judgments Against

1. A judgment against an insane person who has not been adjudged insane is voidable and not void, and cannot be collaterally attacked, and a judgment against an insane person upon a mere semblance of service may be vacated for irregularity, but a judgment against an insane person, obtained without service of process and without appearance in person or by attorney is void and may be attacked collaterally. *Hood v. Holding*, 451.

INSTRUCTIONS see Trial E.

INSURANCE. (Surety bonds see Principal and Surety.)

E The Contract in General.

a Execution of Policy and Time from Which Policy is in Force

1. Where an application for a policy of life insurance signed by the insured and the policy itself provide that the insurer should incur no liability thereon until the issuance of the policy and delivery thereof, and unless the insured should be alive and well at the date of its issuance and delivery: *Held*, in an action on the policy by the beneficiary a nonsuit should have been entered where all the evidence tends to show that the policy, although issued and sent to insurer's agent for delivery in accordance with the terms, had never been delivered because of the ill health of the insured at the time of its issuance, and that the insured, although in sound health at the time of the application, had been in ill health prior to the time of the issuance of the policy and had remained constantly in ill health to the date of his death. *Gilmore v. Ins. Co.*, 251.

b Construction and Operation in General

1. Where a policy of insurance is ambiguous and reasonably susceptible of two reasonable interpretations, it will be construed in favor of the insured. *Dudley v. Woodmen of the World*, 394; *Mitchell v. Assurance Society*, 721.

INSURANCE E b—*Continued.*

2. While the courts will construe an ambiguous policy of insurance strictly against the insurer, they cannot enlarge the liability of the insurer beyond the clear provisions of the policy. *Mitchell v. Assurance Society*, 725.

c Reformation of Policy

1. Where the knowledge of the insurer's agent of a violation of a condition of the policy is imputed to the insurer, and the insurer is thus estopped from declaring a forfeiture of the policy on that ground, it is not necessary that the policy be reformed in order for insured to recover thereon. *Mahler v. Ins. Co.*, 692.

d Assignment of Policy or of Rights Thereunder

1. Where the owner of land takes out fire insurance thereon with loss payable clause in favor of his mortgagee, and thereafter sells the property to another, and requests the agent of the insurer to issue a renewal policy in the name of the new owner with loss payable clause in favor of the same mortgagee, the agent's knowledge of the change of title prior to the issuance of the renewal policy is imputed to the insurer, and where the mortgagor and subsequent owner have assigned their rights under the policy, the assignee may bring action against the insurer to recover for loss by fire occurring subsequent to the issuance of the renewal policy, and to have such recovery impressed with a trust in favor of the mortgagee, the assignee being the real party in interest and the rights under the policy being assignable as a chose in action. *Mahler v. Ins. Co.*, 692.

F Group Insurance.

d Expiration, Renewal and Cancellation

1. Insurer issued a group policy of insurance which provided that insurer should have the option to cancel it after notice at the expiration of any year if a certain per cent of the employees did not avail themselves of its provisions. Insurer canceled the policy in accordance with its terms. Plaintiff received notice of intention to cancel and allowed his premium to be deducted from his wages after such notice, and then received notice of cancellation, and accepted without protest his wages without any deduction for premium. Plaintiff brought suit alleging fraud and deceit in that insurer's agent had represented at the time he subscribed for the insurance that the policy should remain in effect as long as he remained in his employment or until he was retired upon pension: *Held*, plaintiff, with full knowledge, had ratified the provisions of the policy at variance with the agent's representations, and insurer's motion to nonsuit should have been allowed. *Whitmire v. Ins. Co.*, 101.

e Proof of Death or Loss Under Group Policy

1. Plaintiff sought to recover for permanent disability under a certificate of group insurance. The policy provided that proof of such disability must be furnished the company within one year thereof. Plaintiff's evidence tended to show that within the year he furnished the written statement of the attending physician which stated that the disability was not permanent, and that he orally stated his permanent disability to the paymaster in charge of disability claims for the employer, but who was not employed by the insurer. *Held*,

INSURANCE F e—*Continued.*

the burden of proofe was on plaintiff, and the written statement of the physician denied that the disability was permanent, and the oral proof was not shown to have been given a proper agent of the insurer, and the insurer's motion as of nonsuit should have been granted. *Ammons v. Assurance Society*, 23.

G Mutual Benefit Associations.

c Dues and Premiums

1. The members of a local camp of an order were insured by its affiliated mutual benefit association, the members of the camp paying dues to the camp and the camp paying assessments to the association. The by-laws of the association provided that no benefits should be paid for the death of a member who was more than thirteen weeks in arrears in his dues. Insured was thirty-five weeks in arrears in his dues to the camp at the date of his death, but the camp had paid to the association all premiums for all its members, including the insured: *Held*, under the association's by-laws the beneficiary named in the policy was not entitled to recover on the policy, other by-laws of the association relating to the payment of benefits by the local camps not being repugnant to the by-laws providing for forfeiture of benefits for nonpayment of dues. *Brady v. Benefit Association*, 5.

2. The members of a local camp of an order were insured by its affiliated mutual benefit association, the members of the camp paying dues to the camp and the camp paying assessments to the association. The local camp paid assessments to the association on all its members and the association accepted payment without knowledge that insured, one of the members of the local camp, was grossly in arrears in his dues. *Held*, the assessment of insured as a member was paid by the local camp and not by insured, and the association's acceptance of payment without knowledge of insured's bad standing did not constitute a waiver, nor does its retention of the assessment after knowledge constitute a waiver, the question of refunding being a matter of adjustment between the camp and the association, and the camp not being an agent for insured in paying the assessment, the camp being forbidden to do so by the by-laws of the association. *Ibid.*

H Cancellation of Policy.

a Cancellation by Insurer

1. *Held*, insured ratified provisions of policy giving insurer right to cancel, and could not recover for agent's misrepresentations. *Whitmire v. Ins. Co.*, 101.

I Forfeiture of Policy for Breach of Covenants or Conditions Subsequent.

b Nonpayment of Premiums. (Nonpayment of dues to mutual benefit association see Insurance G c.)

1. The provision in a note, given for extension of payment of premium in whole or in part on a policy of life insurance, that the policy would be forfeited without notice if the note should not be paid at maturity, determines the rights of the parties, and the policy is forfeited if the note is not paid at maturity in the absence of waiver or an agreement to the contrary. *Sellers v. Ins. Co.*, 355.

INSURANCE I b—*Continued.*

2. Where a policy of life insurance is forfeited for failure to pay at maturity a note given for extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with C. S., 6465, which notice does not demand payment of the balance due on the extended premium, is not a waiver by the insurer of forfeiture. *Ibid.*

3. Where a policy of life insurance is issued to plaintiff, and sixteen years thereafter another policy is issued to plaintiff in lieu of the former policy, the second policy carrying a much higher premium rate because of the advanced age of the plaintiff, and providing that the nonforfeiture values of the second policy should be computed as of four years prior to the date of its issuance, and further providing that after thirty-six monthly installments of premiums had been paid the insurer, without action by the insured, would apply the cash value of the policy to the payment of premiums if necessary to keep the policy in force: *Held,* the provision as to the application of the cash value of the policy to the payment of premiums will be enforced as of the date provided on the face of the policy for the computation of the nonforfeiture values, and plaintiff was entitled to have the cash value computed and applied to payment of premiums after thirty-six months from such date, and not as of the date of the actual issuance of the policy as contended by insurer. *Dudley v. Woodmen of the World*, 394.

e Unconditional Ownership, Encumbrancing or Additional Insurance

1. In this case the agent for the insurer was notified prior to the issuance of the renewal policy sued on that the property had been sold by the former owner to another and was requested to issue the renewal policy in the name of the new owner. The policy contained a standard loss payable clause in favor of the holder of the mortgage on the property, which clause provided that any neglect on the part of the owner or mortgagor to give notice of increased hazard, change of title, etc., should not affect the mortgagee's rights under the loss payable clause, provided the mortgagee gave insurer such notice upon its knowledge thereof. The renewal policy was issued without change in the name of the owner of the property, and thereafter the mortgagee was informed of the change in ownership and that the insurer's agent had been given notice of such change prior to the effective date of the policy. *Held*, under the facts and circumstances of the case the mortgagee was not required to notify the insurer of the change in ownership, it appearing to the mortgagee that such notice had been given the insurer's agent prior to the inception of the policy, the agent in such case being the insurer's *alter ego*. C. S., 6420. *Mahler v. Ins. Co.*, 692.

K Estoppel, Waiver or Agreement Affecting Right to Declare Forfeiture.

a Knowledge of Violation or Agreement

1. The owner of certain property insured against fire by defendant insurer exchanged the lands for other lands on which the insurer's agent held a mortgage. Insurer's agent, prior to the effective date of the policy, was notified of the change in ownership and requested to issue the policy in the name of the new owner. *Held*, the agent had no interest in the property insured, and the rule that knowledge

INSURANCE K a—*Continued.*

of the agent at the inception of the policy is imputed to the insurer applies. *Mahler v. Ins. Co.*, 692.

M Proof of Death or Loss.

b Delivery of Proof to Agent of Insurer

1. Insured failed to show that he had given proof of disability to proper agent of insurer, and nonsuit was proper. *Ammons v. Assurance Society*, 23.

c Form and Sufficiency of Proof

1. It is not required that an insured should furnish proof of disability to the satisfaction of the insurer, but only that he should furnish such proof of disability as would entitle him to recover if established in court according to the rules of evidence. *Misskelley v. Ins. Co.*, 496.

2. Evidence of submission or waiver of due proof of disability held sufficient. *Mitchell v. Assurance Society*, 721; *Mitchell v. Assurance Society*, 725.

e Waiver of Proof

1. Where an insurer denies liability under a disability clause in a life insurance policy on the ground that the alleged disability resulted from a disease originating prior to the issuance of the policy and therefore did not come within the terms of the disability clause, and that the disability was not total as defined by the policy, the insurer waives proof of disability. *Misskelley v. Ins. Co.*, 496.

2. Evidence of submission or waiver of due proof of disability held sufficient. *Mitchell v. Assurance Society*, 721; *Mitchell v. Assurance Society*, 725.

N Persons Entitled to Proceeds.

a War Risk Insurance

1. The distributees of a policy of War Risk Insurance are the heirs at law of the deceased soldier as determined by our statute of distribution as of the date of the soldier's death, and not as of the time of the death of the beneficiary named in the policy, and where a soldier dies without wife, children, issue of children, or mother him surviving, the father is his sole heir, C. S., 137(6), and although the balance due after payment of the monthly benefits to the beneficiary cannot be distributed until after the beneficiary's death, where the father is named beneficiary such balance, after the father's death, should be paid the father's executor and will pass under the father's will as against the brothers and sisters and half-brothers and half-sisters of the deceased soldier surviving the deceased soldier's father. *In re Saunders*, 241.

c Loss Payable Clauses

1. Under facts of this case mortgagee's interest in insurance held not forfeited by its failure to notify insurer of change of title. *Mahler v. Ins. Co.*, 692.

P Actions on Policies.

a Conditions Precedent, Pleadings and Parties

1. Where an insurance policy provides for payments to insured according to the stipulations in the policy six months after receipt of due

INSURANCE P a—*Continued.*

proof of insured's disability as defined by the policy, a suit on the policy brought prior to the expiration of six months after the furnishing of due proof is premature and should be dismissed, and this result is not affected by insurer's denial of liability on the ground that insured had not become totally and permanently disabled during the life of the policy. *Hundley v. Ins. Co.*, 780.

2. Where the complaint in an action on a policy of insurance alleges liability in the general terms of the policy, and later alleges specific facts upon which recovery is sought, the general allegations will not be limited by the specific allegations if the specific allegations are not inconsistent therewith, and plaintiff being entitled to recover if the general allegations are supported by evidence at the trial, a demurrer to the complaint for failure to state a cause of action should be overruled. *Scott v. Ins. Co.*, 38.

3. Assignee of rights under policy may bring action thereon. *Mahler v. Ins. Co.*, 692.

b Evidence

1. Where evidence is sufficient to sustain liability under any provisions of policy nonsuit is properly refused. *Bolich v. Ins. Co.*, 43.

2. Where in an action by an employee on a group policy of life insurance, he introduces his individual certificate in evidence, his failure to introduce the group policy in evidence will not preclude recovery where the insurer admits in its answer that it had issued its individual certificate with the disability benefits sued on, and admits in evidence that it would be liable thereon if plaintiff were totally and permanently disabled within the meaning of its terms, and it appearing that insurer did not set up this defense in its pleadings, and the court's charge that if plaintiff applied to the company for information as to how to make out his claim and they told him he would have to fill out certain blanks, and that he was out of them, and plaintiff filed a claim in his own handwriting, the best he could do under the circumstances, that it would be a substantial compliance with the requirements of the policy in this respect *is held* not prejudicial. *Smith v. Assurance Society*, 387.

R Accident and Health Insurance.

a Accidental Injury or Death

1. In determining liability under a policy providing for the payment of a certain sum for injury caused by the explosion of an automobile, the word "explosion" will be construed in its popular and not its scientific sense, and the trial court's definition of the term upon evidence tending to show that insured was injured by a stream of hot water suddenly emitted from the radiator of an automobile after a terrible combustion in the motor when a mechanic stepped on the starter *is held* not erroneous. *Bolich v. Ins. Co.*, 43.

2. Where the unambiguous language of a policy of accident insurance defines loss of sight as the irrecoverable loss of the entire sight, it is error for the trial court to enlarge the construction of the term in his charge to the jury as the entire loss of sight for practical purposes. *Ibid.*

INSURANCE R a—*Continued.*

3. In order to recover on a policy of accident insurance conditioned upon death or injury to insured resulting "solely through external, violent and accidental means" it is necessary for claimant to show not only accidental injury or death, but also that the injury or death was produced by "accidental means," which implies "means" producing a result which is not the natural and probable consequence of such means, and it is not sufficient for recovery if the injury or death, though unexpected, flows directly from an ordinary act in which the insured voluntarily engages, but the taking of poison inadvertently or through error is an accidental means within the meaning of the contract. *Mehaffey v. Ins. Co.*, 701.

4. In an action on a policy of accident insurance providing for liability if insured should die as a result of external, violent and accidental means, expert testimony of plaintiff's witness that insured died from some poisonous substance taken internally is insufficient to overrule insurer's motion of nonsuit where all the evidence tends to show that insured had been drinking heavily and continuously sometime prior to his death, that on the morning of his death he drank some buttermilk and thereafter became sick and vomited and took some medicine given him by a pharmacist, and died shortly thereafter, without any evidence that the buttermilk or the whiskey insured had been drinking were poisonous or that the medicine was harmful, and that an autopsy showed his stomach contained blood and mucous and was inflamed, with expert testimony that such condition could have been caused by heavy drinking. *Ibid.*

c Disability Insurance

1. An employee, insured under a group life insurance policy, brought suit on the provision of the policy providing for the payment of a certain sum monthly if insured should become "totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation or financial value." Plaintiff's evidence tended to show that he had consumption in an advanced stage, and that any physical exertion rendered his condition worse, and that plaintiff, a paint foreman, after his discharge for the disability sued on, did odd paint jobs netting him $67.00 over a period of a year and a half in order to provide some support for his wife and children: *Held*, after charging that the burden of proof was on plaintiff and that the disability must have prevented plaintiff from engaging in any occupation or performing any work for compensation, etc., it was not error for the court to charge that if plaintiff performed some work now and then of a trifling nature and thereby greatly reduced his strength and aggravated his disease, it would not be precluded recovery. *Smith v. Assurance Society*, 387.

2. Plaintiff brought suit on a disability clause in a policy of life insurance which provided for certain monthly payments if insured should become disabled by bodily injury occurring or disease originating after the issuance of the policy. Plaintiff testified that at the time of the issuance of the policy his eyesight was not impaired and that he was thoroughly examined by insurer's physician upon his application for the policy, and that no impairment or disease of his

INSURANCE R c—*Continued.*

sight was disclosed by the physician's examination and test of his eyes, and that subsequent blindness had rendered him disabled. Defendant introduced testimony of an eye specialist that from his examination of plaintiff's eyes plaintiff was suffering from a chronic eye disease several years prior to the application for the policy, and moved for a nonsuit on the ground that the evidence showed that the disease resulting in plaintiff's disability originated prior to the issuance of the policy: *Held*, the evidence, viewed in the light most favorable to plaintiff, was sufficient to be submitted to the jury. *Misskelley v. Ins. Co.*, 496.

3. The attending physician's statement as to insured's condition is not conclusive on the question of whether insured had become totally and permanently disabled within the provisions of the policy contract. *Ibid.*

4. In an action on a disability clause in a policy of life insurance providing for the payment of a certain sum monthly to insured if he should become totally and presumably permanently disabled and thereby prevented from engaging in any occupation and performing any work for compensation and profit, an instruction that the question to be determined by the jury was whether insured "was prevented from working with reasonable continuity in his usual work or in such work as he is qualified physically and mentally under all the circumstances to do, substantially the reasonable and essential duties incident thereto" and that ability to do odd jobs of a comparatively trifling nature would not prevent recovery, is held to be without error. *Ibid.*

5. Evidence of insured's total disability and submission or waiver of due proof thereof held sufficient to be submitted to the jury. *Mitchell v. Assurance Society*, 721; *Mitchell v. Assurance Society*, 725.

6. Insured brought action on a clause in a policy of life insurance providing for monthly payments to insured if he should become totally and presumably permanently disabled, and stipulating that disability should be presumed permanent when it had existed for a period of three months, and that when it had existed for such period the effective date for the payment of disability benefits should be one month after continuous disability. Insured proved total disability for a period of sixteen and one-half months, and admitted his complete recovery thereafter. *Held*, insured was entitled to recover disability benefits for the period of disability, it being sufficient for recovery under the policy contract if insured should become totally disabled and such disability be presumably permanent under the provisions of the policy. *Mitchell v. Assurance Society*, 721.

7. The policy of insurance sued on in this case provided for monthly payments to insured if he should become totally and permanently disabled and provided that disability should be presumed permanent when it had existed for a period of not less than three months, and reserved to insurer the right to require proof of continuance of disability from time to time, the benefits to cease upon termination of disability. Insured proved total disability for sixteen and

INSURANCE R c—*Continued.*

one-half months and admitted complete recovery thereafter, and brought suit after complete recovery to recover disability benefits for the period of disability. *Held,* insured was not entitled to recover, since the policy covers only total permanent disability, the provision that disability should be presumed permanent after three months being for the benefit of insured to allow payments in cases where doubt exists whether disability is permanent or temporary, and not being intended to create a conclusive or irrebuttable presumption. *Mitchell v. Assurance Society,* 725.

8. Where liability under policy begins six months after proof of disability action instituted prior thereto is premature. *Hundley v. Ins. Co.,* 780.

INTEREST see Usury; right to interest on tax refund see Taxation E d.

ISSUES see Trial F.

JUDGES—Appeal from one Superior Court judge to another see Courts A f.

JUDGMENTS.

D Judgments by Default.

a By Default Final

1. Where action is instituted against a husband and his wife to set aside a deed made to the husband on the ground that the deed failed, through mutual mistake of the parties, to contain a provision that the grantee should support and maintain the grantors for their lives, and that the condition had been broken, and the husband is served by publication, and it appears that the wife had obtained an order for alimony and counsel fees in her action against her husband for divorce, and had had a commissioner appointed to sell the land upon the husband's failure to comply with the order: *Held,* plaintiffs would not be entitled to a judgment by default final against the husband upon his failure to answer the complaint after due service by publication, it appearing that the wife would suffer serious disadvantages if it should be determined that the husband had no interest in the land at the time of the institution of the action, or if there was collusion between plaintiffs and the husband. *Martin v. Martin,* 157.

F On Trial of Issues.

b Form and Requisites

1. A judgment in an action to recover certain personal property that plaintiff should recover one of two mules, without designating which, and one-half of the other property, consisting of one wagon and harness, one rake and one mower, is uncertain and incapable of execution, and defendant's objection thereto should be sustained. *Barham v. Perry,* 428.

G Entry, Recording and Docketing.

b Time and Place of Rendition

1. After the trial court has left the bench upon the adjournment of the term he may not, without notice to the adverse party, sign an order outside the courtroom modifying a judgment upon a jury verdict rendered during the term. *Pendergraph v. Davis,* 29.

JUDGMENTS G b—*Continued.*

2. Where, upon the call of a case for trial in the Superior Court on appeal from a magistrate's court, it is determined that the defendant had been discharged in bankruptcy pending the appeal, and it is agreed by the parties that the question of the liability of the surety on defendant's stay bond should be determined after the adjournment of the term, the judgment later rendered is *nunc pro tunc* and relates back to the term at which the action was called for trial, and the liability of the surety on the stay bond is not affected by the fact that the effective date of a statute relating to the surety's liability in such cases intervenes between the trial term and the date judgment is actually rendered. *Sutton v. Davis*, 464.

K Attack and Setting Aside.

a Consent Judgments

1. A consent judgment against a minor is void as to such minor where it appears from the record that there was no investigation by the court of the minor's interest and that the judgment was not approved by the court. *Wyatt v. Berry*, 118.

b Surprise and Excusable Neglect

1. Defendant may move to set aside judgment for surprise where attorney has withdrawn without notice. *Gosnell v. Hilliard*, 296.

2. Both the verdict and the judgment based thereon may be set aside by the court in proper instances for surprise and excusable neglect since the enactment of Public Laws of 1892, chap. 81, and where it is declared that the judgment in an action be void and set aside and the case retained to be heard upon its merits, the latter clause of the order vacates the verdict. *Ibid.*

3. The findings of fact by the court below held sufficient upon a liberal interpretation to support the court's order setting aside the judgment for surprise and excusable neglect under C. S., 600. *Spell v. Arthur*, 405.

4. While the neglect of the general counsel of a land bank to prepare and file an answer in an action against the bank may not be imputed to the bank where the attorney is directed to appear and defend the action, where it does not appear that the general counsel was directed to appear in behalf of the bank in the Superior Court or that he undertook to do so, his neglect to procure an attorney to defend the action in the Superior Court is imputable to the bank, the general counsel being regarded as the client's agent in the procurement of an attorney to appear in the action. *Kerr v. Bank*, 410.

d For Irregularity

1. Where an attorney appears in court in an action for the recovery of land, and asks that an infant be made a party to the action and a guardian *ad litem* be appointed for her, which is done, but no service of summons is made on her as required by statute, C. S., 451, 483(2), and the guardian files answer denying the allegations of the complaint, but does not disclose the interest of the infant in the land involved in the action or the facts upon which her interest rests: *Held*, a judgment entered in the action is void as

JUDGMENTS K d—*Continued.*

to the infant, it appearing from the record that the interest of the infant was not presented to the court in good faith and was not passed upon by the court. *Wyatt v. Berry*, 118.

f Procedure

1. A judgment void upon its face is subject to collateral attack. *Wyatt v. Berry*, 118.
2. An executor may not collaterally attack a judgment rendered against him in his representative capacity by setting up matters concluded in the judgment in the creditor's subsequent action in the nature of a creditor's bill, nor may the devisees of the testator collaterally attack the judgment in such action in the absence of allegations of fraud and collusion. *Coleman v. Vann*, 436.
3. Judgment against insane person obtained without service or appearance is void and subject to collateral attack. *Hood v. Holding*, 451.

M Conclusiveness of Adjudication.

b Persons Concluded

1. Taxpayers of town are bound by judgment that mandamus issue to compel levy of taxes to pay town obligations. *Hotel Co. v. Morris*, 484.

c Judgments of Sister States

1. The validity of a judgment of another state decreeing adoption by petitioner of a minor child may not be collaterally attacked in proceedings in this State on the ground that the parents' consent to the adoption was not obtained, and that therefore the foreign court did not obtain jurisdiction, where it appears that the child's father had abandoned it and that its mother had given her written consent in accordance with the procedure of such other state, and that the foreign court was given jurisdiction to decree adoption in such cases according to its laws, the laws of such other state being controlling in the matter. *In re Osborne*, 716.

O Bonds and Security. (Supersedeas bonds see Supersedeas.)

c Application to Judgment Debt

1. Where a judgment in plaintiff's favor is allowed to stand and is not appealed from, plaintiff is entitled to have a State bond filed by defendant to prevent receivership and to secure payment of any judgment which plaintiff should recover, applied to his judgment, and an order that the bond should be returned to defendant's receiver, later independently appointed, as a general asset, is erroneous. *McClure v. Trust Co.*, 345.

JUDICIAL SALES—Tax foreclosure see Taxation H.

JURY.

C Right to Trial by Jury.

a In General

1. Where after the jury has been empanelled the parties to an action on a note admit facts sufficient to support a judgment determining the rights of the parties under the law applicable to such facts, the refusal of the court to submit issues to the jury will be upheld. C. S., 568. *Bank v. Jones*, 648.

JUSTICE OF THE PEACE.

C Jurisdiction.

a Civil Jurisdiction

1. A father executed a note to a merchant as security for advances agreed to be made by the merchant to the maker's three sons for their respective farms. The merchant brought three separate suits in a justice's court against each son and the father and tendered the note executed by the father. On defendants' appeal to the Superior Court, the actions were tried *de novo*. In both courts defendants demurred to the jurisdiction, claiming that one suit should have been instituted on the note which was in an amount in excess of the justice's jurisdiction, and that the Superior Court's jurisdiction was derivative. *Held*, the demurrers were properly overruled, plaintiff having the right at his election to return the note given as security and sue on each individual account. *Warren v. McLawhorn*, 360.

E Review of Proceedings.

a Appeal

1. The right of appeal to the Superior Court from conviction in a justice's court of a misdemeanor within the justice's jurisdiction, C. S., 4647, has been modified by the statutes establishing and expanding the uniform system of recorders' courts, Public Laws of 1919, chap. 277; 1923, chap. 216; 1924, chap. 85; 1931, chap. 233, and under the general provisions of Public Laws of 1919, chap. 277, sec. 54½, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the Superior Court in the counties affected by the act. *S. v. Baldwin*, 174.

LABORERS' AND MATERIALMEN'S LIENS.

B Proceedings to Effect and Form of Claim of Lien.

c Notice to Owner by Subcontractor or Materialman

1. In an action by a materialman against the owner of property to enforce his lien acquired according to statutory provisions, the burden is on the owner to show that he had paid the contractor the full amount due on the contract prior to the serving of the statutory notice on the owner and the filing of the lien when this defense is relied on by the owner, and where the only evidence of payment is that the owner delivered a cashier's check to the contractor for the amount of the contractor's claim, the materialman is entitled to a directed verdict on the issue as to payment of the contractor, the delivery and acceptance of the cashier's check being only conditional payment in the absence of an agreement by the parties that it should constitute payment. *Lumber Co. v. Hayworth*, 585.

LANDLORD AND TENANT.

C Title of Landlord.

b Estoppel of Tenant

1. During the continuance of the relationship of landlord and tenant under a lease contract the tenant will not be allowed to dispute the landlord's title either by setting up an adverse claim or by showing title in a third person. *Springs v. Refining Co.*, 444.

LANDLORD AND TENANT C b—*Continued.*

2. The principle that a tenant is estopped to deny his landlord's title does not apply where the tenant's claim of title to fixtures placed upon the premises and the right to remove same is based upon the provisions of the lease contract between the parties. *Ibid.*

D Terms for Years. (Right to remove trade fixtures see Fixtures.)

b Assignment and Subletting

1. Where a lessee parts with his entire interest in the leased premises to another the transaction is an assignment of the lease and not a subletting. *Springs v. Refining Co.*, 444.

H Rents and Advancements. (Right of lessor to set off claim against landlord as against landlord's assignee see Pleadings C b 1.)

c Bonds to Secure Rent

1. The sureties on a bond to secure the payment of rent in accordance with the terms of a lease, may not be held liable for rent for a period subsequent to the expiration of the lease where the lessee occupies the premises for such period under a separate agreement with the lessor, and not by exercising the option for renewal in accordance with the terms of the lease. *Tarboro v. West*, 200.

"LAST CLEAR CHANCE" see Negligence B b.

LIBEL AND SLANDER.

A Elements and Essentials of Right of Action.

a Words Actionable Per Se

1. The payee took plaintiff's check to defendant bank and requested that it be cashed. The teller went over to the assistant trust officer and assistant secretary of defendant, and then the payee was called over to him, and the officer said in a loud voice "you know O's check is no good; all they have is what they get from the old lady, or beat the old lady out of." *Held*, under the attendant circumstances the words were fairly susceptible of the meaning, within the understanding of those within hearing, of a charge of issuing a worthless check, which is a misdemeanor, or when done with intent to defraud, involves moral turpitude, and the question of the meaning of the words used, within the understanding of those within hearing, considering their knowledge of the facts and the attendant circumstances, is held a question for the jury. *Oates v. Trust Co.*, 14.

2. Where words spoken are actionable *per se* defamation and damage are conclusively presumed, but if actionable only *per quod*, malice and special damage must be alleged and proven, and where the words are susceptible of only one interpretation the question of whether they are actionable *per se* is for the court, while if they are susceptible of two interpretations, one actionable *per se* and the other not, it is for the jury to determine which of the two meanings was intended and so understood within the reasonable apprehension of the hearers. *Ibid.*

LICENSES see Municipal Corporations I d.

LIMITATION OF ACTIONS. (Limitation of time for bringing action for wrongful death see Death B a.)

A Statutes of Limitation.

d Action or Proceedings Barred in Ten Years

1. Execution on decree for owelty is barred in ten years. *Hyman v. Jones*, 266; *Aldridge v. Dixon*, 480.

B Computation of Period of Limitation.

a Accrual of Right of Action

1. An action against a guardian for failure to pay the ward the balance of the estate due the ward after the ward has attained his majority is not barred by the six-year statute of limitations where the guardian has not filed a final account. C. S., 439(2), the statute not applying to such action. *Finn v. Fountain*, 217.

2. The purchase of merchandise on credit, the purchaser paying a certain sum in cash on the account each fall, and the balance due on the account being carried forward into the next year and the next year's purchases being added thereto, is not a mutual, open and current account within the purview of C. S., 421, but is an account current, and as to all items purchased within three years from the last cash payment the three-year statute of limitations will begin to run from the date of the last cash payment, and in an action to recover the balance due, instituted more than three years after the last item charged, but within three years from the last cash payment, an instruction that the whole account was barred by the statute of limitations is error. Whether the account became an account stated at the end of each year is not decided, the plaintiff having failed to make such contention. *Supply Co. v. Banks*, 343.

3. Where the official bond of a public officer by valid contractual limitation covers only the first year of the official's six-year term of office, the statute of limitations begins to run in favor of the surety on the bond from the expiration of the first year of the official's term of office and not the expiration of the official's statutory six-year term of office. C. S., 439. *Washington v. Trust Co.*, 382.

4. Where a petition in partition is filed, and the petitioners enter into possession of their respective shares, in accordance with the judgment of partition therein entered, and it is therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum is made a lien upon the lands, an action by the widow to enforce her claim against the land is barred after the lapse of more than ten years from the partition and decree of owelty, C. S., 445, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, does not alter this result. *Aldridge v. Dixon*, 480.

e Commencement of Action or Proceeding

1. Beginning of execution prior to bar of ten-year statute of limitations will not affect bar of the statute where execution is not completed prior to ten years. *Hyman v. Jones*, 266.

f Death and Administration

1. Mere notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, is not a

LIMITATION OF ACTIONS B f—*Continued.*

filing of the claim within the meaning of the statute providing that where a person dies before the completion of the bar of the statute of limitations in his favor the claim will not be barred if it is one that survives and is filed with the personal representative within one year of the date of the filing of letters testamentary or of administration, C. S., 412, but where, after such notice, the executor carries the item as a debt on the books of the estate and reports it to the clerk as a debt owed by the estate, the executor's approval will be inferred, and the statute will not operate as a bar. *Horne Corp. v. Creech*, 55.

C Matters Affecting Waiver of Plea or Estopping Parties from Pleading Defense.

a Payment

1. Payment on a note by the maker does not deprive an endorser thereon of the defense of the statute of limitations. *Franklin v. Franks*, 96.
2. The liability of a surety on a guardianship bond is dependent upon the guardian's failure to pay damages caused by breach of the bond, and an action is barred as to the sureties in three years from the accrual of a cause of action for breach of the bond, C. S., 441(6), and an action for breach of the bond based upon the guardian's failure to pay the ward the balance of the estate due the ward within six months after the ward attains his majority is barred as to the sureties after three years from the date the guardian should have made payment, C. S., 2188, and the fact that the guardian continued to pay the ward interest on the amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties. *Finn v. Fountain*, 217.

c Fiduciary Relationship of Obligor to Creditor as Affecting Right to Plead Statute

1. A commissioner of a town endorsed a negotiable note made payable to the town. The town brought suit thereon, but long before the commencement of the action the endorser had ceased to be a commissioner: *Held*, the fiduciary relationship formerly existing between the endorser and the town does not prevent the endorser from pleading the statute of limitations as a bar to a recovery against him. *Franklin v. Franks*, 96.

d Promise or Agreement not to Plead

1. Although a party may be estopped from pleading the statute of limitations by an express agreement not to do so or by conduct rendering it inequitable for him to do so, the evidence in this case *is held* insufficient to establish as a matter of law an agreement by an endorser on the note sued on not to plead the statute, and an instruction to answer the limitation issue against the endorser is held for error. *Franklin v. Franks*, 96.

E Pleading, Evidence and Trial.

b Pleading

1. The requirement that the statute of limitations must be pleaded to be available, C. S., 405, applies to actions wherein formal pleadings

LIMITATION OF ACTIONS E b—*Continued.*

are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale, C. S., 2592, 2593, the rights of the parties being determined in accordance with the admitted facts. *In re Gibbs*, 312.

2. Limitation on tax foreclosure suit may not be taken advantage of by demurrer. *Logan v. Griffith*, 580.

LOTTERIES see Gambling.

MALICIOUS PROSECUTION.

A Right of Action and Defenses.

f Liability of Principal for Acts of Agent

1. The evidence in this action for malicious prosecution tended to show that plaintiff was wired a certain sum of money by his brother and that through error of defendant's sending office, plaintiff was paid a sum in excess of the amount wired, that the manager of defendant's receiving office had plaintiff arrested without probable cause and with malice in an attempt to recover the amount paid plaintiff in excess of the amount wired. Defendant moved for nonsuit on the ground that there was no evidence that its manager of the receiving office was acting within the scope of his authority in causing the arrest of plaintiff: *Held*, defendant's motion of nonsuit was properly overruled, there being sufficient evidence that defendant's agent was acting within the scope of his authority. *Brockwell v. Tel. Co.*, 474.

B Actions.

c Evidence

1. In an action for malicious prosecution it is competent for plaintiff to testify, on the issue of damages, as to the condition of the jail wherein he was confined on defendant's warrant, when such testimony is confined to that issue and does not tend to show any neglect of legal duty by the jailer or persons in charge of the jail, such conditions being foreseeable by defendant. *Brockwell v. Tel. Co.*, 474.

MASTER AND SERVANT.

A The Relation.

a Creation and Existence in General

1. The evidence tended to show that one of defendant's trucks broke down on a highway, and that the driver, being unable to communicate with defendant, telephoned the proprietor of a garage in which another of defendant's trucks was stored to send the truck by a certain person not formerly employed by defendant, that the driver sent by the garage proprietor, while rendering the aid asked for by defendant's driver, parked defendant's truck upon the highway at night without lights in violation of statute, and that such improper parking proximately caused the injury in suit: *Held*, in the emergency defendant's employee had authority to employ the second driver, and defendant was liable for the negligent acts of such driver though defendant had not directly employed such driver,

MASTER AND SERVANT A a—*Continued.*

and defendant's employee ordinarily had not authority, express or implied, to employ a driver for defendant. *Barrier v. Thomas and Howard Co.*, 425.

c *Acts Done in Capacity of Employee.* (Scope of employment see, also, hereunder G a, F b; Automobiles D b.)

1. A railroad policeman appointed pursuant to C. S., 3484 is prima facie a public officer, but the question of whether a particular act is done as an employee of the railroad company or as a public officer is a question to be determined from the nature of the act, whether it relates to vindication and enforcement of public justice or whether it is in the scope of duties owed the company by reason of the employment. *Tate v. R. R.*, 52.

d *Employment of Minors*

1. Employment of boy between 14 and 16 years old on duly issued certificate of welfare officer is not unlawful. *Williamson v. Box Co.*, 350.

e *Discharge of Employees*

1. A contract of hire at a stipulated hourly wage, without reference to the number of hours the employment was to continue, gives the employee no right of action for damages because he was employed a fewer number of hours than other employees engaged at the same time. *Sherrill v. Graham County*, 178.

C Master's Liability for Injuries to Servant.

a *Nature and Extent in General*

1. Where an employer, before employing a boy between 14 and 16 years of age, procures and in good faith relies upon a certificate duly issued by the county welfare officer authorizing such employment, C. S., 5034, the employment of the minor is not unlawful, and the decision in *McGowan v. Mfg. Co.*, 167 N. C., 192, is not applicable to an action brought by the minor to recover for an injury sustained in the course of his employment. *Williamson v. Box Co.*, 350.

2. In order to make an employer liable in damages for an injury sustained by an employee between 14 and 16 years of age in being required to work more than 8 hours a day in violation of C. S., 5033, it must be shown that the violation of the statute was a proximate cause of the injury complained of. *Ibid.*

b *Tools, Machinery and Appliances and Safe Place to Work*

1. An employer must exercise ordinary care to provide employees reasonably safe means and appliances, including stairways and platforms necessary for their use in the performance of their duties, and evidence that steps of a stairway used by employees as a permanent part of their equipment had been allowed to become worn and slick, resulting in injury to an employee when she stepped on a slick place and fell, is held sufficient evidence to be submitted to the jury on the issue of the employer's negligence. *Batson v. Laundry*, 93.

2. Where the evidence tends only to show that an employee between 14 and 16 years of age, engaged in an unhazardous duty, was injured by tripping over a lever to a machine placed outside of the provided passage-way, without evidence that the machinery was

MASTER AND SERVANT C b—*Continued.*
negligently placed in the factory, and that he returned to work several days after the injury and was again similarly injured while attempting to use an elevator solely in a spirit of mischief, without evidence of any defect in the elevator *is held* insufficient to be submitted to the jury in an action against the employer to recover for the injuries. *Williamson v. Box Co.*, 350.

e Negligence of Fellow-Servant

1. In this action by an employee against her employer to recover for personal injury alleged to have resulted from the employer's negligence, the evidence tended to show that the plaintiff went from the inside of the building where she was employed to work to the outside of the building for rest and fresh air, and sat on a window ledge, that the transom of the window had been raised for ventilation and left in a position where it could not fall or cause injury, but that another employee, a fellow-servant of plaintiff, in order to more conveniently talk with plaintiff from the inside of the building, moved the transom and that afterwards the transom fell upon plaintiff, causing the injury in suit. *Held*, there was no evidence of any negligence on the part of defendant employer, the evidence tending to show that the injury resulted solely from the act of plaintiff's fellow-servant, and a judgment as of nonsuit should have been entered on defendant's motion, and *held further*, the doctrine of *res ipsa loquitur* does not apply. *Armstrong v. Spinning Co.*, 553.

g Contributory Negligence of Servant

1. Evidence that a worker in a laundry was required to bring packages down a stairway in the building, that the number of packages carried at one trip was left exclusively to the employee, and that the employee was familiar with the condition of the stairway, and that she took a double armful of packages at one trip so that she was unable to see the steps immediately in front of her, and that she slipped and fell upon a slick place on a badly worn step *is held* to disclose contributory negligence barring a recovery as a matter of law, an employee being under duty to exercise reasonable care for his own safety. *Batson v. Laundry*, 93.

F North Carolina Workmen's Compensation Act.

a Nature, Construction and Application

1. Where an employee has accepted compensation awarded by the Industrial Commission for an injury sustained by him in the course of his employment he is barred by the Compensation Act from maintaining an action against a third person upon allegations that the negligence of such third person was the proximate cause of his injury, the employer or its insurance carrier being subrogated to the right of action against such third person to the extent of the amount of compensation paid, the employee being interested in the recovery only in the event the recovery exceeds the amount of compensation paid or for which the employer or insurance carrier is liable, and where an action is brought against such third person by the employee alone, the employee is not the real party in interest, C. S., 446, and it is error for the trial court to grant the employee's motion to strike from defendant's answer allegations

MASTER AND SERVANT F a—*Continued.*

setting up the defense that plaintiff had been awarded compensation by the Industrial Commission for the injury sued on. C. S., 537. The order granting plaintiff's motion to strike from the answer allegations setting up the award of the Industrial Commission is reversed without prejudice to plaintiff to move that the insurance carrier be made a party plaintiff. *McCarley v. Council*, 370.

2. A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the Compensation Act. N. C. Code, 8081(l). *Perdue v. Board of Equalization*, 730.

3. The State Board of Equalization has no power or duty in regard to teachers of a graded school district other than to provide for their salaries as provided by chapter 430, Public Laws of 1931, and a person elected teacher and director of athletics by a school district, C. S., 5559, whose salary as teacher is paid with funds allotted by the State Board of Equalization and whose salary as director of athletics is paid by the district from other funds, is an employee of the school district and not an employee of the Board of Equalization or the State, and the school district is liable for an award of compensation by the Industrial Commission for his death by accident arising out of and in the course of his employment, the legislative intent not to make teachers employees of the State within the meaning of the Compensation Act being shown by the acts providing that the State should make no allowance for compensation insurance for any of the counties, section 30, chapter 430, Public Laws of 1931, and that counties and school districts might exempt themselves from the Compensation Act, section 1, chapter 274, Public Laws of 1931. *Ibid.*

4. A boy employed by a truck driver for a bottling company with the knowledge and consent of the company, whose services are necessary to the proper distribution of the products of the company is an employee of the company within the meaning of the Workmen's Compensation Act. *Michaux v. Bottling Co.*, 786.

5. Where in a hearing before the Industrial Commission the employer testifies that he employed three men other than himself, and another witness testifies that at the time of the injury in suit there were two men working besides the employer and that the other employees were on vacation, the evidence is insufficient to support the finding of the Industrial Commission that the parties were bound by the Compensation Act, since the evidence tends to show that the employer regularly employed less than five employees and the act expressly excludes casual employees, and there being no contention that the parties had elected to be bound by the act in the manner therein prescribed. N. C. Code of 1931, sec. 8081(u), (b). *Dependents of Thompson v. Funeral Home*, 801.

b Injuries Compensable

1. In order for an accidental injury to be compensable under the Compensation Act it must arise out of and in the course of the employment, and both elements are essential to an award. *Beavers v. Power Co.*, 34.

MASTER AND SERVANT F b—*Continued.*

2. Claimant joined other employees on the mill ground at the suggestion of the foreman for the purpose of taking a group picture, and was injured when a seat prepared by the photographer collapsed. The employer had no interest in the picture, which was taken of those voluntarily wishing to appear therein, the photographer alone intending to profit from their sale. *Held,* the injury did not result from an accident arising out of and in the scope of claimant's employment. *Beavers v. Power Co.,* 34.

3. An injury compensable under the Workmen's Compensation Act is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. N. C. Code, 8081(2), (f). *Ridout v. Rose's Stores,* 423.

4. Whether an accident arose out of and in the course of claimant's employment is a mixed question of law and fact. *Ibid.*

5. The deceased employees were the manager and assistant manager of defendant's store. On Sunday they made a trip in a car belonging to one of them from the town in which the store was located to another town in which defendant owned a warehouse. While there one of them went to see his fiancée. Before returning they placed certain merchandise from the warehouse in the car to transport it back to the store. Neither employee was required to work on Sunday or to make the trip as a part of his employment. Upon conflicting evidence the Industrial Commission found that they were engaged in an adventure primarily for personal and social reasons and that the receipt of the goods was incidental to the trip and not in the performance of any express or implied duty connected with the employment: *Held,* the findings of fact support the award of the Industrial Commission denying compensation, there being no causal relation between the employment and the accident. *Ibid.*

6. Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to ride him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put up his lunch in the room where he worked and went to a platform at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury *is held* sufficient to support the finding of the Industrial Commission that the injury resulted from an accident arising out of and in the course of his employment. *Gordon v. Chair Co.,* 739.

7. A helper of a truck driver, left behind while playing or scuffling with another boy, ran and caught up with the truck, and in attempting to climb upon the moving truck, fell to his injury and death. *Held,* if he was guilty of contributory negligence in attempting to climb upon the moving truck it would not preclude recovery under the provisions of the Compensation Act, and his prior scuffling would not preclude recovery, such acts bearing no relation to the subsequent injury and death. *Michaux v. Bottling Co.,* 786.

MASTER AND SERVANT F—*Continued.*

c Preliminary Procedure and Proceedings

1. The claim of an injured employee under the Compensation Act is barred if not filed within one year of the accident. *Wray v. Woolen Mills*, 782.

2. Where the claim of an employee under the Compensation Act is dismissed because not filed within one year of the accident, and pending appeal the employee dies as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death is not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an original right enforceable only after his death. Chapter 120, sec. 24, Public Laws of 1929. *Ibid.*

d Hearings Before Commission

1. Evidence taken before the Industrial Commission upon a claim of an injured employee is competent in proceedings by his dependents to recover compensation for his death later resulting from the accident. *Wray v. Woolen Mills*, 782.

h Amount Recoverable and Applications for Review of Amount of Award

1. Where the findings of the Industrial Commission, supported by evidence, are to the effect that a review of the award of compensation is sought by an employee more than twelve months from the date of the last payment, the order of the Commission denying further compensation will be upheld by the courts. N. C. Code, 8081(bbb). *Lee v. Rose's Stores*, 310.

i Appeals from Industrial Commission

1. The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of his employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. *Ridout v. Rose's Stores*, 423; *Perdue v. Board of Equalization*, 730; *Wray v. Woolen Mills*, 782.

2. Conclusions of law on which the Industrial Commission makes or denies an award are not conclusive on the court. *Perdue v. Board of Equalization*, 730.

3. On appeal from an award of the Industrial Commission the court's order in compliance with the statute as to attorney's fees is within its discretion and is not reviewable. *Perdue v. Board of Equalization*, 730.

4. Where on appeal from an award of the Industrial Commission it appears that the evidence is insufficient to support the findings of the Industrial Commission that the parties were bound by the Compensation Act, the evidence tending to show that defendant employer regularly employed less than five employees, appellant's demurrer to the jurisdiction should be sustained and the award should be vacated or set aside, although appellant did not attack the jurisdiction of the Industrial Commission in the hearing before it, nor will the Supreme Court on appeal remand the cause for further jurisdictional findings, the record disclosing that the question was passed upon by the Industrial Commission, and there being no

MASTER AND SERVANT F i—*Continued.*

motion in the Superior Court to remand after the filing of appellant's demurrer. *Dependents of Thompson v. Funeral Home*, 801.

G State Regulations of Liability of Railroad Employers for Injuries to Employees.

b Nature and Extent of Employers' Liability

1. Plaintiff's evidence tended to show that after the close of his day's work as section hand on defendant's railroad, he voluntarily got on a hand car with the rest of the crew and his foreman upon the invitation of the foreman, in order to go to the store for groceries for the accommodation of one of the crew, and that plaintiff was injured in an accident occurring on the way to the store: *Held*, plaintiff was not acting within the scope of his employment at the time of the injury, and defendant's motion as of nonsuit should have been allowed, plaintiff being *sui juris*, and if transportation back to the section house where the hand car was kept was a part of his employment plaintiff could have waited until the car had returned from the trip to the store. *Colvin v. R. R.*, 168.

MATERIALMEN'S LIENS see Laborers' and Materialmen's Liens.

MECHANICS' LIENS see Laborers' and Materialmen's Liens.

MONOPOLIES—Case involving question of monopoly decided on question of procedure, see Pleadings I a 1.

MORTGAGES.

C Construction and Operation.

c Lien and Priority: Registration and Indexing

1. The provisions of our statute as to the indexing and cross-indexing of deeds or mortgages is mandatory and requires that such instruments shall be indexed and cross-indexed in the names of all the parties thereto under the proper letter of the alphabet, and the indexing and cross-indexing of a deed of trust given by a life tenant and the remainderman owning the land, in the name of the life tenant only followed by the words "*et als*," is not a sufficient compliance with the statute, and where the life tenant and remainderman have subsequently executed another deed of trust on the same lands which is registered, indexed and cross-indexed in compliance with the statute, the purchaser under foreclosure of the second deed of trust acquires title free from the lien of the improperly indexed prior deed of trust. *Woodley v. Gregory*, 280.

d Property Mortgaged and Estate and Rights of Parties Therein

1. Ordinarily the mortgagee is not entitled to rents from the mortgaged premises until entry is made or suit for foreclosure is begun, although as between the mortgagor and mortgagee equity may make the mortgage a charge upon the rents and profits when the mortgagor is insolvent and the security is inadequate. *Kistler v. Development Co.*, 755.

2. Where a receiver has been appointed to take possession of all property and assets of an insolvent corporation, manage same and collect all rents and profits and preserve the assets for the benefit of creditors, and is given power to allow in his discretion the

MORTGAGES C d—*Continued.*

holders of mortgages against the property of the corporation to collect rents and profits from the specific land covered by their mortgages to the extent of delinquent interest, a petition filed in the Superior Court by one of the mortgagors to segregate rents and profits from the land covered by his mortgage for his benefit is properly denied where it appears that the mortgagee had failed to institute foreclosure proceedings although the mortgage debt was past due and it does not appear that he had requested leave of the receiver to make such collections and had been refused. *Ibid.*

H Foreclosure. (Rights of mortgagee after foreclosure of tax certificate see Taxation H c.)

b Right to Foreclosure and Defenses

1. In suit to restrain foreclosure for usury plaintiff must pay principal of debt plus six per cent interest. *Jonas v. Mortgage Co.*, 89.

2. The makers of purchase money notes executed a duly registered deed of trust to A. as security, and later conveyed the lands to A. in full payment. A. transferred the notes in due course as collateral for a debt due a company. A. thereafter borrowed money from B. a member of the company, and paid the debt to the company, and assigned the mortgage note to B. after maturity for the borrowed money. *Held*, B, could not maintain the position of a holder in due course of the mortgage note and was not entitled to foreclose as against the lienors and grantees of A. who took the lands without notice, B. having been assigned the note after maturity, and the payment of the debt to the company, and the assignment of the mortgage note to B. constituting a novation as far as the rights of A.'s lienors and grantees were concerned. *Holland v. Dulin*, 202.

3. A mortgage or deed of trust follows the debt and is an incident thereto and security therefor, and where notes secured by a mortgage are barred by the statute of limitations, and the power of sale contained in the instrument is barred by the lapse of over ten years from the date of the last payment on the notes, C. S., 437(3), 2589, the mortgagor may restrain the trustee in the instrument from foreclosing under the power of sale therein contained, and the trustee's contention that the mortgagor would have to pay the amount of the notes in order to be entitled to the equitable relief of restraining the foreclosure on the principle that he who seeks equity must do equity, is unavailing. *Serls v. Gibbs*, 246.

4. Under the facts set forth in this action and appearing from the pleadings the judgment of the lower court continuing an order restraining defendant from foreclosing the deed of trust to the final hearing is affirmed, the general rule being that a temporary order will be continued to the hearing where serious controversy exists and continuance will not harm defendant and dissolution might cause great injury to plaintiff. *Ferebee v. Thomason*, 263.

5. Suit was brought by a tenant in common in lands to restrain the foreclosure of a mortgage given his cotenant for money borrowed. Plaintiff alleged that defendant had agreed not to foreclose the mortgage during the current year in consideration of plaintiff's renting defendant's interest in the lands and that plaintiff had breached his contract by advertising the property and that certain

MORTGAGES H b—*Continued.*

credits had not been allowed on the mortgage debt as agreed upon by the parties, and prayed for an accounting: *Held*, the temporary restraining order entered in the cause should have been continued to the hearing, it appearing that serious dispute existed between the parties. *Teeter v. Teeter*, 438.

6. Where in a judgment appointing a receiver for an insolvent corporation the facts found support the conclusion of the court that the corporation could not protect the property and pay claims of unsecured creditors, and that for the benefit of all parties it was necessary to protect assets and preserve equities and to prevent interference with the property by foreclosure, etc., the court's order prohibiting foreclosure suits except by leave of court will not be disturbed, it appearing that the order was governed by a sound and judicial discretion. *Kistler v. Development Co.*, 755.

7. Where a consent judgment for the amount of the mortgage debt stipulates that foreclosure should be delayed for six months provided mortgagor should pay a certain sum monthly, mortgagee is entitled to foreclosure at the expiration of the period, regardless of whether the monthly payments were made as agreed, if at that time the mortgage debt is not paid or any amount tendered on the judgment. *Tilley v. Lindsay*, 824.

8. Judgment continuing to final hearing a temporary order restraining foreclosure of mortgage upon real dispute as to the accuracy of description and the amount secured by the mortgage is affirmed on authority of *Parker Co. v. Bank*, 200 N. C., 441. *Smith v. Agricultural Corp.*, 846.

e Parties

1. Where the court has continued a temporary order restraining the trustee from foreclosing a deed of trust to the final hearing, his order for the joinder of the *cestuis que trustent* as parties defendant is not error. *Ferebee v. Thomason*, 263.

g Decree of Foreclosure, Proceedings and Execution

1. In a suit to foreclose a mortgage an order of the trial court that the bidder at the sale or resales be required to secure his bid before acceptance of the same, is within the sound discretion of the trial court, and is not reviewable. *Koonce v. Fort*, 413.

m Title and Rights of Purchaser

1. Purchaser at foreclosure of prior mortgage acquired title free from lien of subsequent mortgages, and doctrine of after acquired title is inapplicable to facts of this case. *Bank v. Johnson*, 180.

2. Under provisions of this deed of trust purchaser at sale held not entitled to crops as against mortgagor's tenants. *Bank v. Page*, 248.

MUNICIPAL CORPORATIONS.

A Creation and Existence.

a Incorporation

1. There are no constitutional restrictions upon the power of the General Assembly to create municipal corporations, and where a

MUNICIPAL CORPORATIONS A a—*Continued.*

municipal corporation is duly created by private act, and the town is organized under the act after due notice as required by law, the smallness of the population of the incorporated area does not affect the validity of its incorporation, and it is a duly created and organized municipality. *Starmount Co. v. Hamilton Lakes*, 514.

2. Port Commission of Morehead City held public corporation and Legislative act creating it held valid. *Webb v. Port Com.*, 663.

E Torts of Municipal Corporations.

a Exercise of Governmental and Corporate Powers

1. Fact that defendant is governmental agency may not be taken advantage of by demurrer where fact does not appear from complaint. *Ball v. Hendersonville*, 414.

c Defects or Obstructions in Streets or Other Public Places

1. City held not liable for damages resulting to abutting property by reason of narrowing sidewalk. *Ham v. Durham*, 107.

2. Where a city adopts plans of a competent engineer for street improvements which call for graduated drains across each side of one of the streets at a street intersection to accommodate the flow of surface water along the other street, such drainage being necessary in the engineer's opinion because of the contours of the ground at that point, the city may not be held liable in damages by a passenger in an automobile who was violently bumped and severely injured when the automobile in which she was riding passed over the drains at a reasonable rate of speed, there being no evidence of negligent construction or negligent failure to keep the streets in reasonable repair, and the adoption of the original plans for the construction being in the exercise of judgment in the discharge of a governmental function for which the city may not be held liable. *Blackwelder v. Concord*, 792.

g Appropriation of Private Improvements

1. Evidence that the owner of a subdivision outside the corporate limits of a city constructed water mains therein, and for his own convenience and profit connected them with the city's water system, and that the city furnished water through such mains to the residents of the development, collecting water rentals from the residents, and that thereafter the corporate limits of the city were extended to include the development, and that the city continued to furnish water to the residents of the development in the same manner as before the extension and without any assertion of ownership of the mains installed by plaintiff, *is held* insufficient to show a taking or appropriation of the plaintiff's mains, and the city's motion as of nonsuit in the owner's action to recover the value of such mains should have been allowed, and the fact that the city repaired a leak in such mains and flushed them at a dead-end does not alter this result, such acts being incidental to the furnishing of water, nor does the connection of water lines outside the development with such mains after the extension of the city limits constitute an appropriation of plaintiff's property by the city. *Farr v. Asheville*, 82.

MUNICIPAL CORPORATIONS E g—*Continued.*

2. Evidence of city's appropriation of plaintiff's water main held insufficient to be submitted to jury. *Cherry v. Charlotte*, 837.

h Interference with Property Rights by Watershed Regulations

1. Plaintiff brought action alleging that through apprehension of violating sanitary regulations promulgated by defendant city for lands within its watershed she abandoned the use to which she had previously put her land, her apprehension being based on ignorance of the regulations through defendant city's failure to serve notice of such regulations on her as required by statute and her apprehension of incurring the penalties therein provided: *Held*, defendant's demurrer to the complaint was properly sustained, the city having acquired no easement in the lands by grant, prescription, dedication or condemnation, and the plaintiff not being liable for the statutory penalty unless notice of the regulations had been served on her, and the complaint failing to allege any actual trespass by defendant, or any action on its part to enforce the regulations, or that defendant had wrongfully diverted or diminished the flow of water on plaintiff's land, or any specific allegation that plaintiff's land was within defendant's watershed. *Hudson v. Morganton*, 353.

F Contracts and Conveyances.

e Attack and Setting Aside Contracts and Conveyances

1. In this action to set aside and cancel a deed to a city on the ground of fraud and collusion between the officers of the city and the officers and stockholders of the vendor, the evidence is held to permit the inference that the sale was made without warrant of law, that the price paid was grossly excessive, and that certain city officers were financially interested in the transaction to the knowledge of the other defendants, and that the interests of the city were not adequately protected by those defendants charged with that duty, and the evidence is held sufficient to be submitted to the jury. *Atkinson v. Asheville*, 36.

G Public Improvements.

h Curing Defects by Validating Act of Legislature

1. Where an incorporated town levies an assessment against abutting property owners for street improvements in paving a strip on either side of a State highway running through the town under authority of N. C. Code (Michie), 3846(ff), but such levies are made without a petition of the abutting owners as prescribed by C. S., 2707, the assessments are invalid but not void, and the Legislature has the power to validate the assessments by subsequent legislative act, the Legislature having had the power to authorize the assessment in the first instance. *Crutchfield v. Thomasville*, 709.

H Police Powers and Regulations.

d Public Safety and Health

1. A city ordinance prohibiting parking of automobiles on one side of a street on certain blocks where, because of the narrowness of the street, there is insufficient room for cars to pass between parked cars and a street-car track in the street, *is held* reasonable and

MUNICIPAL CORPORATIONS H d—*Continued.*

valid, the ordinance being necessary to prevent obstruction of the street and not applying to stopping of vehicles for the unloading of passengers or merchandise. *S. v. Carter*, 761.

2. An ordinance requiring operators of motor busses within the city to file policies of liability insurance in solvent surety companies would seem to be valid. *Flemming v. Asheville*, 765.

c Violation and Enforcement

1. Where a section of a city ordinance prescribes a tax "upon every gasoline pump or tank located upon any sidewalk," and another section of the ordinance prescribes a penalty for its violation, the tax is required of the operator or owner of such pumps, and is not merely a charge against the pumps themselves, and failure to pay the tax prescribed subjects the owner or operator of such pumps to the penalty. *S. v. Evans*, 434.

2. Injunction held not to lie to prevent enforcement of ordinance in this case. *Flemming v. Asheville*, 765.

I Rights in and Regulations of Public Places. (City's liability for defects or obstructions therein see hereunder E c.)

a Streets

1. A city has the power to provide by ordinance for the proper regulation of the use of its streets. C. S., 2787(71), (31). *S. v. Carter*, 761.

2. The word "park" as used in ordinances regulating motor vehicles means allowing such vehicles to remain standing on a street while not in use. *S. v. Carter*, 761.

b Sidewalks

1. An abutting owner may not recover from a city damages resulting to his property by reason of the fact that the abutting sidewalk has been narrowed in order to widen the street under orders of the city commissioners, the width of the street and sidewalk being within the sound discretion of the commissioners. *Ham v. Durham*, 107.

d License Taxes for Purpose of Regulation

1. The provision of the Revenue Act, Public Laws of 1931, chap. 427, sec. 153, prescribing that no county, city or town should levy a license tax on the business of selling gasoline at retail in excess of one-fourth of the State license tax does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. *S. v. Evans*, 434.

K Fiscal Management and Public Debt. (Constitution Restrictions on Taxation see Taxation.)

a Purposes of Municipal Taxation

1. The courts determine what are necessary municipal expenses, and the governing body of the municipality determines in its discretion whether a given project is necessary for the particular municipality. *Starmount Co. v. Hamilton Lakes*, 514.

MUNICIPAL CORPORATIONS K—*Continued.*

c Formal Requisites of Bond Issues

1. Where the Legislature has validated bonds issued by a municipal corporation for necessary expenses, objections to their validity on the ground that a majority of the commissioners of the town issuing the bonds lived outside the corporate limits will not be sustained, the Legislature having the power to authorize the issuance of bonds for necessary expenses and to clothe designated persons with the power to execute same for and in behalf of the municipality, and, therefore, having the power to ratify their issuance. *Starmount Co. v. Hamilton Lakes*, 514.

e Rights and Remedies of Taxpayers

1. In the absence of fraud or mistake, the taxpayers of a municipality are bound by a judgment duly obtained against the municipality for municipal improvements and by judgment that mandamus issue to compel the municipal governing body to levy a tax sufficient to pay the judgment, the municipality representing its taxpayers in such suit although they are not *eo nomine* named therein. *Hotel Co. v. Morris*, 484.

MURDER see Homicide.

NEGLIGENCE. (Of persons in particular relationships see Master and Servant C; Electricity A; negligence in particular circumstances see Railroads D, Automobiles C; Animals A; Food A; imputed negligence see Automobiles C j; actions for wrongful death see Death B.)

A Acts and Omissions Contributing Negligence.

c Condition and Use of Lands and Buildings

1. In order for an invitee to recover of the owner or lessor of a building for injury resulting from a fall on the steps in the building it is necessary to show defective or negligent construction or maintenance of the steps and the owner's or lessor's express or implied notice thereof, and where the invitee testifies that she constantly used the steps and that there was nothing unusual in their construction, and that she had never noticed anything wrong with them or loose on them, a nonsuit is correctly entered in her action to recover for injuries sustained in a fall when the heel of her shoe caught in an ordinary metal strip on the edge of the steps. *Sams v. Hotel*, 758.

e Res Ipsa Loquitur and Circumstances from Which Negligence May be Inferred

1. The fact of an explosion in the tanks or gasoline pipes of a filling station under the exclusive control and operation of defendants is sufficient to invoke the doctrine of *res ipsa loquitur*, and overrule defendant's motion as of nonsuit in plaintiff's action to recover for property damage resulting therefrom, leaving the question of whether negligence will be inferred from the fact of the explosion for the determination of the jury. *Howard v. Texas Co.*, 20.

2. Plaintiff's evidence tended to show that she fell while attempting to go down the stairs in her home in the dark after all lights in the house had gone out, and that her fall was caused by her miscalculation of the number of steps to the landing. There was no evidence

NEGLIGENCE A e—*Continued.*

as to why the lights went out. In her action against the power company it is held a judgment as of nonsuit was properly entered, the doctrine of *res ipsa loquitur* not applying when all the facts causing the accident are known and testified to at the trial. *Payne v. Light Co.*, 32.

3. While neither negligence nor proximate cause will be presumed from the fact of injury, and mere conjecture will not support an action for damages, negligence need not be proven directly, but proof of circumstances from which reasonable men could draw divergent conclusions as to negligence is sufficient to overrule defendant's motion of nonsuit. *Corum v. Tobacco Co.*, 213.

4. The doctrine of *res ipsa loquitur* does not apply where it is shown by direct evidence that the injury in suit was caused not by defendant's negligence, but by the act of plaintiff's fellow-servant. *Armstrong v. Spinning Co.*, 553.

B Proximate Cause.

b Last Clear Chance

1. Peril and the discovery of such peril in time to avoid the injury is the basis of the doctrine of the last clear chance, and the burden upon the issue is on plaintiff and the issue should not be submitted unless there is evidence to support it. *Miller v. R. R.*, 17.

2. Doctrine of last clear chance held applicable, and nonsuit should have been overruled in this action for wrongful death. *Triplett v. R. R.*, 113.

d Concerning Negligence

1. There may be concurrent proximate causes of injury. *Bullard v. Ross*, 495.

D Actions. (Employee receiving compensation may not alone sue third person *tort-feasor* see Master and Servant F a 1.)

e Verdict and Judgment

1. Where jury affirmatively answers issues of negligence and contributory negligence and awards damages, plaintiff is not entitled to recover. *Bullard v. Ross*, 495.

E Culpable Negligence.

a Negligence of Defendant

1. In an action involving the issue of wanton or culpable negligence, defendant's exception to the trial court's definition of "wanton" as implying reckless and criminal indifference to consequences and the rights of others, is not sustained, defendant having no reason to complain since an act may be culpable without being criminal. *Wise v. Hollowell*, 286.

NEW TRIAL.

B Grounds for New Trial.

g Newly Discovered Evidence. (In criminal cases see Criminal Law J d.)

1. In this case defendant moved in the Supreme Court for a new trial on the ground of newly discovered evidence, and filed an affidavit of a material witness repudiating his testimony upon the trial.

NEW TRIAL B g—*Continued.*

Plaintiff took deposition of the witness in which the witness swore that the affidavit was false. In the Supreme Court the case together with the motion is remanded to the Superior Court to the end that the court with the aid of the solicitor may investigate the charges and counter-charges, and that a new trial may be awarded if it be ascertained that the witness' testimony upon the trial was false. *Robertson v. Power Co.*, 111.

2. Affidavits in this case held insufficient to support defendants' motion in the trial court for a new trial for newly discovered evidence, and ordinarily such motion is addressed to the sound discretion of the trial court. *Trust Co. v. Ebert*, 651.

h Power of Court to Order New Trial in its Discretion

1. The trial court has the power to set aside a verdict and order a new trial at any time during the term during which the action was tried. C. S., 591. *Brantley v. Collie*, 229.

NONSUIT see Trial D a.

PARENT AND CHILD—Adoption see Adoption; custody and support in divorce action see Divorce F; parent's liability for child's negligent driving see Automobiles D c.

PARTIES. (Misjoinder of parties and causes see Pleadings D b; parties who may sue on contract see Contracts F a; parties in foreclosure suit see Mortgages H e; employee receiving compensation may not sue third person *tort-feasor* without joinder of employer see Master and Servant F a 1.)

B Parties Defendant.

b Proper Parties

1. In action involving right of guardian of insane person to have estate credited with amount lost in insolvent bank, surety on guardianship bond held proper party at most, no breach of the bond being alleged. *Marriner v. Mizzelle*, 204.

2. Motion for joinder of proper party is addressed to discretion of court. *Horne v. Horne*, 309.

PARTITION. (Action on decree for owelty granted in partition proceedings barred by Statute of Limitations see Limitation of Actions B a 4.)

B By Acts of Parties.

c Operation and Effect

1. Where tenants in common in lands agree to a division thereof, and in order to effect a partition, execute deeds to each other for their respective shares, the fact that the deed to one of them is executed to him and his wife does not create an estate by the entireties in the husband and wife, but operates merely as a partition of the land and conveys no additional estate, and where the wife survives the husband, an action by her heirs to recover possession of the land from the husband's heirs, in which no equitable element is involved or presented, a demurrer to the complaint setting forth such deed to the husband and wife is properly sustained. *Burroughs v. Womble*, 432.

PARTNERSHIP—Partner's right to offset partnership deposit against individual debt due bank see Banks and Banking H d 1; Settlement between partnership and corporation and third person see Compromise and Settlement A b.

PAYMENT.

B Application of Payment.

b Application by Creditor

1. Where, with the consent of the principal debtor, certain sums due him by the creditor are applied without the knowledge or consent of the debtor's sureties to an old account not covered by the surety contract, the sureties are not entitled to have the account for which they are secondarily liable credited with said sums, such sums belonging to the debtor and he being entitled to apply them as he pleased. *Portrait Co. v. Furches*, 539.

2. Creditor held entitled to apply payment to unsecured debt as against guarantors of debtor. *Midland Co. v. Glass Co.*, 763.

c Creditor's Right to Apply Funds Due Debtor to the Debt

1. Plaintiff was defendant's tenant farmer, defendant advancing money to plaintiff, and the parties sharing the crops equally. The operations for one year resulted in a balance due from plaintiff to defendant in a certain sum. The operations for the next year resulted in a profit and a sum due plaintiff by defendant. There was conflicting evidence whether plaintiff instructed defendant to apply the amount due plaintiff from the second year's operations to the debt due defendant by plaintiff from the first year's operations, defendant claiming that plaintiff had instructed him to apply the surplus to the debt. *Held*, a directed instruction in the plaintiff's favor was erroneous, the evidence as to the direction for the application of the funds being conflicting. *Baker v. Sharpe*, 196.

C Transactions Operating as Payment.

a Payment by Check

1. A check is only conditional payment and does not ordinarily discharge the debt until paid by the drawee bank, but if a check is not paid on account of the payee's unreasonable delay in presenting it for payment, the negligence of the payee will discharge the debtor. *Raines v. Grantham*, 340.

2. Delivery of cashier's check is only conditional payment in absence of agreement that it should constitute payment. *Lumber Co. v. Hayworth*, 585.

3. The acceptance of a check constitutes conditional payment in the absence of an agreement to the contrary, but where a mortgagee accepts a check for the amount of the mortgage debt, marks the note secured by the mortgage "paid," and delivers the note and the canceled mortgage to the mortgagor and cancels the mortgage of record, it is sufficient to establish an agreement that the check should constitute full payment, and the debt is discharged although the check is not paid by the drawee bank upon due presentment because of insolvency, and where the trial court finds such facts, a jury trial being waived, and there is sufficient evidence to support the findings, a judgment in mortgagor's favor will be affirmed. *South v. Sisk*, 655.

PERJURY.

B Prosecution and Punishment.

c Evidence

1. In a prosecution for perjury, conflict in the testimony of defendant and the prosecuting witness which is subject to explanation, with no direct testimony that defendant swore falsely at the time alleged in the bill of indictment, is insufficient to be submitted to the jury. *S. v. Sinodis*, 602.

PLEADINGS. (In particular actions see Particular Titles of Actions.)

A Complaint.

a Contents, Form and Requisites. (Misjoinder of parties and causes see hereunder D b.)

1. Deceased was killed in a collision occurring while she was riding on a bus in another state. The statute of the state wherein the collision occurred required that an action to recover for her wrongful death should be brought jointly by her husband and her minor children. Plaintiffs instituted suit here to recover under the statute, the complaint being drawn in the name of the husband and minor children of deceased, and containing a joint prayer for damages. Defendant demurred on the ground that the allegations of the complaint were not sufficient to constitute a joinder by the husband in the action. *Held*, liberally construing the complaint as a whole, it stated a joint action by the husband and children, since the husband would thereafter be barred from setting up an inconsistent claim against the adverse party on the same subject-matter. *Rodwell v. Coach Co.*, 292.

2. An allegation that the negligence of defendant railroad company in maintaining an underpass in an unsafe condition was "wanton" is a mere conclusion of the pleader. *Baker v. R. R.*, 329.

3. Complaint may allege one cause of action and several elements of damage. *Pemberton v. Greensboro*, 599.

f Prayer for Relief

1. Where a complaint sufficiently alleges facts entitling plaintiff to recovery, such recovery will not be defeated by a prayer for relief to which plaintiff is not entitled. *Grantham v. Grantham*, 363.

2. The prayer for relief does not narrow or enlarge the relief to which plaintiff is entitled, the relief to which he is entitled being determined by the allegations of the complaint established by evidence. *Mortgage Co. v. Long*, 533.

C Counterclaim and Set-Offs.

b Subject-Matter

1. The lessor took lessee's check to guarantee lessee's contract to rent a building to be constructed by lessor, and gave lessee a receipt stating that the sum should be returned upon execution of satisfactory bond or occupancy of the building. Before the building was complete the parties entered a supplemental agreement providing that extra improvements should be made and that lessee should pay the cost thereof over a stipulated sum. The lessee borrowed money from a bank and assigned as security the lessor's receipt.

PLEADINGS C b—*Continued.*

Lessor's claim against lessee for extra improvements exceeded the amount deposited by lessee under the original contract. The building was completed and paid for by lessor, and lessee took possession thereof. The bank, as assignee, sued lessor on the receipt, and denied lessor's right to plead the amount due by lessee for extra improvements as a set-off: *Held*, the lessor was entitled to plead by way of counterclaim the rights under the original lease and the supplemental agreement arising out of the same contract. As to whether the deposit created the relationship of debtor and creditor or pledgor and pledgee, *quære? Bank v. Realty Co.*, 99.

2. While a counterclaim for usury may be set up in an action on the note, such counterclaim may not be set up in an action in ejectment based on title to the property under foreclosure of the deed of trust securing the note. *Mortgage Corp. v. Wilson*, 493.

D Demurrer.

a For Failure of Complaint to State Cause of Action

1. Upon a demurrer for failure of the complaint to state a cause of action the pleading will be liberally construed in favor of plaintiff, and the demurrer will be overruled if the complaint in any portion or to any extent presents facts sufficient to constitute a cause of action. *Scott v. Ins. Co.*, 38; *Burroughs v. Womble*, 432; *Clay Co. v. Clay Co.*, 830; *In re Bank*, 840.

b For Misjoinder of Parties and Causes

1. Plaintiff bondholders brought action against the company issuing the bonds and an individual defendant, alleging that the individual defendant had purchased some of the bonds and given the issuing company's note therefor endorsed by him, and deposited the note and the bonds for the benefit of plaintiff bondholders and had promised plaintiff bondholders that he would pay the taxes assessed against the property, that he failed to do so, but that he procured the county and city authorities to foreclose the property for the taxes and thereafter had the county's bid at the sale assigned and deed executed to him. Plaintiffs seek primarily to set aside the tax foreclosure sale, and to have the property sold under their deed of trust and further to have the proceeds of the sale of the property, after deducting taxes, applied to the payment of the company's note given for the purchase price of the bonds and endorsed by the individual defendant. *Held*, there was no fatal misjoinder of parties and causes of action, and the individual defendant's demurrer on that ground was properly overruled. *Walker v. Securities Co.*, 165.

2. An action by the receiver of the estate of a decedent against the executrix in her representative capacity for failure to file accounts and mismanagement of the estate, etc., and against the executrix individually and an heir at law for the diversion of the funds to the heir and to corporations controlled by him, and against the corporation to recover assets of the estate thus wrongfully diverted to their use, states a cause of action in the nature of a creditors' bill for an accounting and the recovery of assets wrongfully disposed of, and the complaint is not subject to demurrer for mis-

PLEADINGS D b—*Continued.*

joinder of parties and causes, since, construing the pleading as a unit, it relates a connected story arising out of the same transaction or series of transactions, setting up one general right of plaintiff, though the rights of defendants may be distinct. *Bundy v. Marsh*, 768.

3. An action to recover on a promissory note and to set aside a conveyance of property by the maker as being fraudulent to creditors is not demurrable for misjoinder of parties and causes. *Allred v. Robbins*, 823.

c Defects Appearing on Face of Complaint and "Speaking Demurrers"

1. Where the complaint in an action against a corporation sufficiently alleges a cause of action for damages arising in tort, and it does not appear from the face of the complaint that defendant corporation is a municipal agency created by statute, or that its negligence complained of was committed by it while acting as an administrative or governmental agency of the city, the corporation's demurrer setting forth such facts and maintaining that it was not subject to suit in tort is bad as a speaking demurrer, and should have been overruled. *Ball v. Hendersonville*, 414.

d When Demurrer May Be Pleaded

1. The filing of an answer waives the right to demur *ore tenus* on the ground that a good cause of action is insufficiently stated. *Little v. Little*, 1; *Walker v. Securities Co.*, 165.

2. A motion to dismiss an action on the ground that one tenant in common may not sue another for possession is properly denied when the motion is not made until after judgment and the question has not been raised by movant prior thereto, but a motion to dismiss on the ground that the action is not within the jurisdiction of the court may be made at any time. *Barham v. Perry*, 428.

e Effect of Demurrer

1. A demurrer admits allegations of fact in the complaint but not inferences or conclusions of law therein. *Tea Co. v. Hood*, 313; *In re Bank*, 840.

I Motions.

a Motions to Strike Out or Make Allegations More Specific

1. In an action to declare illegal certain lease and commission contracts made by defendants on the ground that they were in contravention of C. S., 2559-2574, relating to monopolies and trusts, judgment was entered sustaining defendants' demurrer to the complaint on the ground that it failed to allege facts sufficient to constitute a cause of action in that a general averment was insufficient and the complaint failed to allege any understanding or agreement between defendants or any specific acts preventing independent competition or specific facts constituting a monopoly, and leave was given plaintiff to file an amendment within a specified time. There was no appeal from the judgment. Plaintiff filed an amendment to its complaint alleging in general terms an agreement between defendants in restraint of trade. Defendants moved to strike out the amendment on the ground that it was not responsive to the order

PLEADINGS I a—*Continued.*

allowing the amendment: *Held,* the judge of the Superior Court hearing the motion to strike out was bound by the former judgment declaring that a general averment without allegation of specific facts was insufficient to constitute a cause of action, and his order allowing defendants' motion is affirmed. *S. v. Oil Co.,* 123.

2. Where defendants' answer aleges matters in defense which had been determined and precluded by a judgment against them or their privy, a motion to strike out such allegations is properly allowed. *Coleman v. Vann,* 436.

3. Several elements of damages may be alleged on one cause of action, and where this has been done, defendant's motion to require plaintiff to file an amended complaint, based on the theory that each element of damage constituted a separate cause of action and should be separately alleged, is properly refused. C. S., 506. *Pemberton v. Greensboro,* 599.

b Motions for Bill of Particulars or to Make Allegations More Specific

1. The court has the discretionary power to allow an application for a bill of particulars, C. S., 534, or to grant a motion to require a pleading to be made more definite and certain, C. S., 537, or to strike out in his discretion orders previously made under the statutes, and no appeal will lie from such discretionary orders. *Temple v. Tel. Co.,* 441.

2. The fact that a defendant might have proceeded under C. S., 900-901 for an examination of the adverse party does not render the granting of his motion to require plaintiff to make his complaint more definite and certain or file a bill of particulars improvident as a matter of law, and the trial court's action in striking out such order on the ground that it was improvidently entered is reviewable and will be held for error. *Ibid.*

J Defects and Waiver.

c Waiver of Failure to Plead by Controverting Question During Trial

1. Where a broker in his complaint alleges a general contract and upon the trial sets up the general contract and a special contract between the parties, and both parties fight out both phases of the case with evidence, defendant may not maintain that the complaint failed to sufficiently allege the special contract. *Sweet v. Spinning Co.,* 134.

POLICE—Whether railroad policeman is employee or officer of the law see Master and Servant A c 1.

POWER COMPANIES see Electricity.

PRINCIPAL AND AGENT. (Brokers see Brokers.)

C Rights and Liabilities as to Third Persons. (Liability of owner for driver's negligence see Automobiles D.)

d Wrongful Acts of Agent

1. Evidence that defendant's agent acted within authority in causing arrest held sufficient to be submitted to jury in action against principal. *Brockwell v. Tel. Co.,* 474.

PRINCIPAL AND SURETY. (Sureties on notes see Bills and Notes.)

B Construction and Operation.

c Bonds of Public Officers. (Limitation of actions on, see Limitation of Actions B a 3.)

1. As a general rule a surety's liability on the bond of a public officer ceases when the term of office of the principal expires by operation of law. *Washington v. Trust Co.*, 382.

2. While the statutory bond of a public officer must be written in accordance with the provision of the applicable statute, and any discrepancy will usually be treated as an irregularity and void, C. S., 324, this rule does not preclude the parties from contracting in the bond for liability for a shorter period than the official term of office of the principal. *Ibid.*

3. The board of aldermen of a city appointed a trust company as sinking fund commissioner for the term of six years. Defendant surety company executed the bond required of the commissioner by statute, the bond reciting that the principal had been appointed sinking fund commissioner for the term of one year, and being conditioned upon the faithful performance of the commissioner's duties. At the expiration of the first year of the commissioner's term another surety executed a bond covering the whole six year term, the board of aldermen being given statutory power to examine all bonds yearly and renew them if the security was impaired or adjudged insufficient, and the bonds not being made cumulative by reason of renewal, sec. 82, chap. 170, Private Laws of 1903. *Held*, defendant's bond covered a period of one year only, and the city accepted the bond with knowledge of this fact. *Ibid.*

d Bonds for Public Construction

1. Whether items furnished a contractor in the construction of a public highway are material used in the construction, or tools and implements of the contractor is a question for the jury where the evidence is conflicting, and a question of law where the facts are admitted. *Hardware Co. v. Indemnity Co.*, 185.

2. In determining whether items furnished a contractor in the construction of a public highway are materials used in the construction for which the surety on the contractor's bond is liable, or tools or equipment of the contractor for which the surety is not liable, the general rule is that such items as are necessary and indispensable to the performance of the contract, which the parties reasonably contemplate will be incorporated into the work or consumed in the performance of the contract and which lose their identity in the finished product are to be regarded as material, and in this case there was evidence that some of the items furnished the contractor, including hatchets, shovels, axes, etc., were constituent parts of the equipment of the contractor, and a directed verdict against the surety on the contractor's bond for such items was error. *Ibid.*

3. Where a contractor in the construction of a public highway is compelled as a matter of necessity to furnish his laborers board and lodging as a part of their compensation, deducting his charges therefor from their wages, items necessary for such commissary are covered by the contractor's bond providing for the surety's liability for labor and materials used in the construction, but under

PRINCIPAL AND SURETY B d—*Continued.*

the evidence in this case the surety could not be held liable for items used in the commissary, there being no showing that such commissary was necessary to the performance of the work or that the boarding and lodging of laborers was a part of the contract of hire for which deduction could be made from their wages. *Ibid.*

C Actions on Surety Bonds.

c Summary Proceedings on Bonds of Public Officers

1. Plaintiff instituted summary proceedings under C. S., 356, against the clerk of the Superior Court and the surety on his bond to recover for the clerk's default in failing to return to plaintiff, as ordered by the Superior Court, moneys deposited with the clerk. Notice and complaint in the proceeding were served on defendants 2 September, 1933. Another creditor of the clerk instituted suit against the clerk on 2 September, 1933, in her own behalf and in behalf of all persons similarly situated, who wished to make themselves parties, and decree was entered in the suit 9 September, 1933, appointing a permanent receiver for the clerk, authorizing the receiver to bring suit on the clerk's bonds, and enjoining all creditors of the clerk from instituting any other suit or action against him or on his bonds. In the summary proceeding under C. S., 356, the surety on the clerk's bond pleaded the decree of 9 September in bar to plaintiff's right to judgment, and the trial court dismissed the summary proceeding. *Held*, the summary proceeding should have been consolidated with the suit in the nature of a general creditor's bill, and the order of the trial court dismissing the summary proceeding is reversed. *Power Co. v. Yount*, 321.

PROCESS.

B Service of Process. (On insane persons see Insane Persons I a.)

a On Domestic or Domesticated Corporations

1. Where there is no evidence that person on whom service was made was agent of corporation at time of service the corporation's motion to dismiss upon special appearance should be allowed. *Sellers v. R. R.*, 149.

c Service by Publication and Attachment

1. In order to a valid service by publication it is required that the statutory affidavit, besides showing that the defendant cannot be found in the State after due diligence, must show that a cause of action exists against such defendant or that he is a proper party to an action involving real estate, and that such defendant has property in this State and the court has jurisdiction. C. S., 484. *Martin v. Martin*, 157.

2. Where the statutory affidavit filed upon motion for service of a defendant by publication is deficient in that it fails to state the cause of action against such defendant with sufficient definiteness, and fails to aver that the defendant has property in this State, plaintiff's verified complaint, filed at the time of the affidavit may be considered as an affidavit upon which such process may issue where the defects of the affidavit are supplied by the complaint, and a complaint in an action to set aside a deed to the defendant for

PROCESS B c—*Continued.*

condition broken sufficiently alleges that defendant owned property in this State, although the complaint alleges that plaintiffs were the owners of such property, the title to such property remaining in defendant until the deed is set aside. *Ibid.*

PUBLIC OFFICERS. (Whether railroad policeman is employee or officer of the law see Master and Servant A c 1; bonds of public officers see Principal and Surety C c.)

C Rights, Powers, Duties and Liabilities.

d Liability to Third Persons Injured by Neglect of Duty

1. There is no penalty or crime imposed upon county commissioners by C. S., 1297(12), for their failure to perform the ministerial duty therein imposed upon them of qualifying and inducting into office certain county officers and approving the bonds of such officers, but C. S., 335, makes them liable as sureties on bonds which they approve with knowledge, actual or implied, that they are insufficient in penal sum or security, and construing the statutes together it *is held* that the county commissioners may be held individually liable by a person sustaining loss by reason of their failure to perform their ministerial duty of requiring bond of a clerk of the Superior Court. *Moffitt v. Davis*, 565.

RAILROADS. (As carriers see Carriers; liability to employees see Master and Servant G b.)

D Operation.

b Accidents at Crossing

1. Where, in an action to recover for intestate's death resulting from a collision between his car and defendant's train at a grode crossing, the evidence viewed favorably to plaintiff fails to show that the engineer could have stopped the train and avoided the injury after he saw or could have seen, in the exercise of due care, intestate's car on the tracks, the submission of the issue of the last clear chance is error. *Miller v. R. R.*, 17.

2. It is the duty of a railroad company to exercise due care to keep a careful lookout at a populous grade crossing, and to warn of the approach of its trains thereto by ringing the bell or sounding the whistle, or both, the degree of vigilance required being in proportion to the apparent danger. *Johnson v. R. R.*, 127.

3. The violation of a town ordinance regulating the speed of trains within its limits is negligence *per se*, the ordinance being intended to prevent injury to person and property. *Ibid.*

4. In order for negligence to be actionable it is necessary that it should be the proximate cause of the injury in suit, and where there is any sufficient evidence of causal relation the question is for the jury, otherwise it is for the court, and the evidence in this case tending to show that plaintiff's intestate was riding in a car driven by the owner, that the car stopped at a crossing within the corporate limits of a town while a southbound train passed on one track and that the driver then went upon the tracks and that the rear wheel of the car was struck by a northbound train passing on a second track, together with other evidence, *is held* sufficient evidence of the causal relation between defendant's negligence in

RAILROADS D b—*Continued.*

exceeding the speed limit prescribed by the town ordinance and its negligence in failing to give warning of the approach of its train to the populous crossing by ringing its bell or sounding its whistle. *Ibid.*

5. Testimony of witness that he did not hear bell ring is some evidence of railroad's failure to give warning although other witnesses give positive testimony that bell was rung. *Ibid.*

6. A driver of an automobile is not required under all circumstances to stop before driving upon a railroad grade crossing, and whether he is required to do so under the particular circumstances disclosed by the evidence is ordinarily a mixed question of law and fact to be submitted to the jury upon proper instruction from the court, and in this case, under evidence tending to show that by reason of a defective hood on an automatic electric signal at a much used crossing the green signal with the word "go" was lighted by the rays of the sun, the question of whether the driver was guilty of contributory negligence in failing to stop was properly submitted to the jury under the rule of that degree of care that an ordinarily prudent man would have observed for his own safety under the circumstances, the fact that the green signal was lighted being an assurance of safety to the driver. N. C. Code, 1931, sec. 2621(47). *Keller v. R. R.*, 269.

c *Injuries to Persons on or Near Track*

1. Evidence tending to show that plaintiff's intestate, an eleven-year-old boy, was sitting on a cross-tie about twenty feet from defendant's public grade crossing, that he was grazing a cow which he was holding by a chain, that he was looking down, and when the train was about fifty feet from him, got up and stooped over as though doing something, and was struck and killed by defendant's train, that the engineer failed to blow for the crossing, and that the track was straight and unobstructed for a distance of about two hundred yards and that the engineer could have seen the intestate and the cow for that distance *is held* sufficient to take the case to the jury on the doctrine of last clear chance, the evidence tending to show that the intestate was on the track oblivious or otherwise insensible of danger. *Triplett v. R. R.*, 113.

2. Where there is evidence that defendant's passenger train, coasting down grade at a rapid speed, struck and killed plaintiff's intestate who was crossing defendant's tracks by a foot path, and that the train gave no signal or warning of its approach, but all the evidence tends to show that at the scene of the accident defendant's tracks were built on a fill and that the top of the fill extended level with the tracks for a distance of eight to twelve feet on either side, and that within six to eight feet of the track defendant's approaching train could have been seen for a distance of 200 yards, defendant's motion as of nonsuit is properly allowed. *Young v. R. R.*, 530.

d *Highway Underpasses*

1. The evidence tended to show that the driver of an automobile fell asleep and ran his car into a concrete pillar supporting a railroad

RAILROADS D d—*Continued.*

trestle over a highway underpass, and that there was a distance of 10½ or 11 feet on either side of the concrete pillar for the passage of traffic. *Held,* the driver may not recover from the railroad company for injuries resulting to him from the accident. *Baker v. R. R.*, 329.

RECEIVERS. (Court may restrain foreclosure of property placed in receiver's hands see Mortgages H b 6; court may appoint receiver in pending action against decedent's estate see Executors and Administrators C a.)

F Actions.

b Suits Against Receivers

1. In an action against a railroad company for wrongful death occurring prior to the receivership of defendant company it is necessary for plaintiff to obtain permission to sue from the Federal Court appointing the receivers, U. S. C. A., sec. 125 giving permission to sue only for causes of action arising from the negligence of the receivers or their agents. *Sellers v. R. R.*, 149.

2. The order appointing receivers for the Norfolk Southern Railroad Company does not give permission for suit against the receivers for wrongful death occurring prior to the receivership, the powers given the receivers by the order in respect to instituting and defending suits not amounting to a leave of court to institute such action. *Ibid.*

REFERENCE.

A Proceedings.

b Pleas in Bar

1. A plea in bar of a reference is not conclusive unless it extends to the whole cause of action so as to defeat it absolutely and entirely. *Reynolds v. Morton*, 491.

2. A suit to declare a trust in lands and for an accounting upon allegations of an agreement between the parties that defendant should purchase the property owned by plaintiff upon the foreclosure of the second deed of trust thereon and use the rents and profits therefrom after paying the expenses of operation to pay and discharge the note secured by a first deed of trust on which defendant was an endorser, and then reconvey the lands to plaintiff or some person designated by him is held subject to reference by the court on its own motion, C. S., 573(5), and defendant's answer denying the trust and other material allegations of the complaint is not such a plea in bar as to entitle defendant to a determination of the plea before reference, defendant not having denied the acquisition of the legal title by him. *Ibid.*

C Report and Findings.

a Affirmance, Modification, Setting Aside, and Additional Findings by Court

1. The trial court may overrule a finding by the referee upon exceptions duly taken, and make additional findings in regard to the matter, and base an adverse conclusion of law thereon. *Polikoff v. Service Co.*, 631.

REFERENCE C—*Continued.*

d Remand for Additional Findings

1. The findings of fact by the referee, supported by evidence and approved by the trial court are conclusive on appeal unless some error of law has been committed in the hearing, and where an order remanding the case to the referee for additional facts has been entered, and on appeal therefrom the order is affirmed, a hearing by the referee after notice without further order from the court, and his finding of such additional facts will not support an appeal, it appearing that no prejudice has resulted to appellants by failure of the trial court to order the case remanded after affirmance of the appeal if such order was necessary, the additional findings being supported by evidence and being approved by the trial court, but if such order is necessary it could be entered *nunc pro tunc. Wilson v. Allsbrook,* 597.

REFORMATION OF INSTRUMENTS.

A Grounds for Reformation.

c Mutual Mistake

1. Where property is conveyed to grantee under an agreement that the grantee should hold it in trust for himself and the other purchasers paying their proportionate part of the purchase price, and the deed fails to describe the grantee as "trustee" through the mutual mistake of the parties, the other purchasers are entitled to reformation of the deed as against the grantee's judgment creditors. *Crossett v. McQueen,* 48.

REMOVAL OF CAUSES.

C Citizenship of Parties.

b Separable Controversy and Fraudulent Joinder

1. Upon a motion to remove a cause to the Federal Court on the grounds of separable controversy the allegations of the complaint are controlling and the cause is not removable if joint liability is alleged. *Tate v. R. R.,* 51.

2. Upon a petition to remove a cause to the Federal Court on the grounds of fraudulent joinder the jurisdiction of the State Court ends upon the filing of a proper bond and verified petition setting forth facts sufficient to require removal under the law, the State Court having the right to pass upon the sufficiency of the bond and the petition, but the allegations of the petition are taken as true, the plaintiff having a right to traverse the jurisdictional facts in the Federal Court upon motion to remand. *Ibid.*

3. Plaintiff brought action against a railroad policeman and the railroad at whose instance he was appointed to recover for the wrongful death of plaintiff's intestate. The complaint alleged that the resident defendant, while acting within the scope of his duties to the railroad company, maliciously shot and killed plaintiff's intestate when plaintiff's intestate was discovered in a box car where he was riding as a licensee. The railroad company filed petition for removal for fraudulent joinder, alleging that the resident defendant was acting as a public officer and not an employee at the time of the shooting. *Held,* the petition for removal contained more than a denial of the allegation of the complaint, and specifically

REMOVAL OF CAUSES C b—*Continued.*

alleged facts constituting fraudulent joinder, and the petition should have been allowed, the allegations of the petition being taken as true. *Ibid.*

4. This action was brought against the clerk and assistant city clerk and cashier of a city to recover for misappropriation of city funds and conspiracy to defraud the city out of moneys collected under color of their offices and misappropriated or embezzled, and against the nonresident corporate sureties on their official bonds. The corporate defendants moved for a removal of the causes to the Federal Court, their petitions for removal showing the requisite jurisdictional amounts and asserting rights of removal on the ground of diverse citizenship and separable controversies: *Held,* the petitions for removal should have been granted, the allegations of the complaint as to conspiracy between the individual defendant not affecting the liability of the corporate defendants on the bonds, or the question of separability. *Wilson v. Deposit Co.,* 262.

D Amount in Controversy.

a Determination of Amount in Controversy

1. In this action on a policy of life insurance plaintiff claimed disability entitling him to waiver of subsequent premiums and the payment of disability benefits for his lifetime during continuance of the disability, and that upon his death defendant would be liable for $5,000, the face amount of the policy, and prayed judgment for $300 accrued disability benefits and accrued interest and that defendant be required to pay plaintiff $50.00 per month during continuance of the disability. Defendant filed a petition for removal of the cause to the Federal Court. *Held,* the suit did not involve $3,000, the required jurisdictional amount, and the petition should have been denied, the test being the value of the property of which defendant would be deprived by the judgment demanded. *Smith v. Ins. Co.,* 348.

REPLEVIN see Claim and Delivery.

"RESIDENCE" see Chattel Mortgages B b 1.

"RES IPSA LOQUITUR" see Negligence A e.

"RULE IN SHELLEY'S CASE" see Deeds and Conveyances C c.

SALES.

I Conditional Sales. (Chattel Mortgages see Chattel Mortgages.)

d Rights and Remedies of Seller

1. While an assignee of a conditional sales contract on an automobile may peaceably repossess the car by going upon the purchaser's property in accordance with the terms of the contract after default in the payment of the purchase price in accordance with the agreement, where there is evidence that the agent intimidated the one in possession of the premises by loud, violent or abusive language, so that she yielded in order to avoid a breach of the peace, the question of whether the agent committed a trespass in the repossession of the car is for the jury, although the original entry may have been peaceable and lawful. *Freeman v. Acceptance Corp.,* 257.

SALES I d—*Continued.*

2. Where the purchaser of an automobile signs a conditional sales contract stipulating that the seller or his assignee may repossess and sell the car without notice upon default in the payment of the purchase price according to the terms of the agreement, the seller or his assignee may exercise the right to repossess after default if repossession does not involve a civil trespass, but where the car is parked on a street by the purchaser and contains personal belongings of the purchaser, the repossession of the car without notice involves a civil trespass in the carrying away of such personal belongins of the purchaser. *Narron v. Chevrolet Co.*, 307.

3. The provision in a conditional sales contract that if proceedings in bankruptcy were instituted against the purchaser all deferred payments should become due and the seller or his assignee entitled to immediate possession for the purpose of selling the property, entitles the seller or his assignee to immediate possession upon the happening of the condition notwithstanding that none of the deferred payments was due according to the schedule of payment. *Hardware Co. v. Malpass*, 605.

SCHOOLS AND STATE ADMINISTRATIVE AGENCIES.

D State Administrative Agencies.

a Respective Powers and Duties of Administrative Agencies

1. The provisions of chapter 342, Private Laws of 1907, authorizing the school commissioners of the city of Charlotte to employ and fix the salaries of teachers in its public schools and to adopt a school budget for the city, is not repealed by chapter 430, Public Laws of 1931, the general statute dealing primarily with the six-months term of school, and its provisions requiring the school budget of a county or city to be approved by the State Board of Equalization, and establishing a method of making a school budget, etc., applying only to counties and cities receiving aid from the State for an extended term of school, and the city of Charlotte not receiving such aid for an extended term during a school year, the budget of its school committee for such year is not affected by a reduction in the schedule of salaries for its teachers ordered by the State Board of Equalization, where the city authorities refused to accept such reduction. The difference in the repealing clause of chapter 562, Public Laws of 1933, is pointed out. *Hammond v. Charlotte*, 469.

2. An act creating a special charter school district and providing among other things that an issue of bonds for school sites, buildings, etc., should first be submitted to a vote of the electors of the district, is repealed by a later general act, chapter 562, Public Laws of 1933, enacted to provide a uniform State system of public schools in the interest of economy and better management, which provides a different method for the issuance of bonds for such purposes and expressly repeals all conflicting laws, and provides that such special charter and tax districts should levy taxes for school-operating purposes only as provided in the general act, and where such district has been constituted an administrative unit by the State School Commission, it may not be successfully maintained that a

SCHOOLS AND STATE ADMINISTRATIVE AGENCIES D a—*Continued.*
bond issue for school sites, buildings, etc., in such district must first be submitted to the voters of the district in accordance with the provisions of the former law. *Evans v. Mecklenburg County*, 560.

G Teachers.
a Election, Appointment and Term
1. Teachers employed by school district are employees of the district and not the State. *Perdue v. Board of Equalization*, 730.

SET OFF. (Pleading, see Pleadings C; set offs allowable against bank receiver see Banks and Banking H d.)
A Right to Set Off In General.
b Mutuality
1. As a general rule, joint and separate debts, or debts accruing in different rights, are not allowed to be set off against each other, due to want of mutuality. *In re Bank*, 333.

SHERIFFS—Whether railroad policeman is employee of railroad or officer of the law see Master and Servant A c 1.

SPECIFIC PERFORMANCE.
B Contracts Specifically Enforceable.
b Contracts to Convey Land
1. A parol contract for the conveyance of land cannot be enforced to the extent of decreeing specific performance of the agreement, and plaintiff may not successfully maintain that he is the *cestui que trust* and defendant the trustee of the land for his benefit. *Grantham v. Grantham*, 363.

STATES.
A Relation Between the States. (Extradition see Extradition.)
a Transitory Causes and Determination of Which Laws Govern
1. An action instituted in the courts of this State to recover for wrongful death resulting from an accident occurring in another State is governed by the laws of such other state relating to negligence and liability. *Wise v. Hollowell*, 286.
2. In an action for wrongful death resulting from an accident occurring in another state the law of the state in which the accident took place governs as to all matters pertaining to the substance of the cause of action or which affects the rights of the parties, while matters relating to procedure are governed by the laws of the state wherein the action is brought, but the measure of damages affects a substantial right and is governed by the *lex loci*, and where the trial court has erroneously applied the measure of damages in accordance with our laws a new trial on the issue of damages will be awarded. *Ibid.*
3. The fact that the statute of the state in which a collision occurs, resulting in death of the intestate, differs from our statute for wrongful death in the provision as to the parties who may maintain the suit and the measure of damages recoverable is not sufficient to deprive our courts of jurisdiction to hear the action and apply the laws of such other state, the rule being that transitory

STATES A a—*Continued.*

actions arising in another state may be maintained here under comity unless contrary to public policy, and the difference in the statutes not being sufficient to deprive our courts of jurisdiction on that ground. *Rodwell v. Coach Co.*, 292.

4. The rule that the courts of one state will not enforce a penal statute of another state applies only to statutes which are entirely penal and prescribe a punishment for violation of law, and a statute that merely provides for the recovery of punitive damages for the benefit of the individual bringing the action as a part of the compensatory damages is not such a penal statute as to come within the rule, and in this case, *held,* plaintiffs, residents of North Carolina, could maintain an action in the courts of this State to recover for the wrongful death of the intestate resulting from a collision occurring in Georgia while she was a passenger for hire on a motor bus, and our courts had jurisdiction to apply the Georgia law providing that such action could be maintained by the husband and children of intestate and that punitive damages could be recovered upon a showing of negligence. *Ibid.*

5. Where a contract for the loan of money stipulates that the laws of another state should govern, and such stipulation is inserted in the contract in bad faith in order to evade the usury laws of this State, our courts will disregard the stipulation and apply the provisions of our laws in an action by the borrower to recover twice the amount of usury charged and received, and the evidence in this case is held sufficient to support a finding of bad faith. *Polikoff v. Service Co.*, 631.

b Full Faith and Credit to Foreign Judgments

1. Where the courts of another state have jurisdiction of the parties and subject-matter, its judgment in the cause is not subject to collateral attack in this State, but such foreign judgment will be given full faith and credit under Art. IV, sec. 1, of the Federal Constitution. *In re Osborne*, 716.

E Claims Against the State.

d Interest on Recovery or Refunds

1. The State never pays interest unless it expressly engages to do so. *Cannon v. Maxwell, Comr.*, 420.

STATUTE OF FRAUDS see Frauds, Statute of.

STATUTE OF LIMITATIONS see Limitation of Actions.

STATUTES.

A Requisites and Validity.

b Special Acts Affecting Corporations

1. Whether an act of the Legislature is public or private, general or special within the meaning of a constitutional provision affecting its validity for that reason depends upon its purpose and not its classification by the public official charged with the duty of making such classification. C. S., 7659. *Webb v. Port Com.*, 663.

2. Article VIII, sec. 1, prohibiting the Legislature from creating a corporation by special act, applies to private or business corporations and not to public or *quasi*-public corporations having govern-

STATUTES A b—*Continued.*

mental functions as agencies of the State, and whether a corporation is a private or business corporation within the prohibition is to be determined by the purposes for which it was created. *Ibid.*

3. The Port Commission of Morehead City, created by chap. 75, Private Laws of 1933, is a public corporation created as an agency of the State to perform the governmental function of providing port facilities for the commerce of the State in the public interest, and not for private gain, and the Legislature is not prohibited from creating such corporation by Art. VIII, sec. 1, nor is the act creating it a special act within the meaning of this section of the Constitution, and the Commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act. *Ibid.*

B Construction and Operation.

a General Rules

1. The settled administrative practice as established by uniform and long-continued interpretation of statutes by the administering State officials, while not controlling, is entitled to due consideration in the construction of the statutes. *Cannon v. Maxwell, Comr.*, 420.

b Time of Effect, Retroactive and Prospective Statutes

1. Chapter 251, Public Laws of 1933, amending C. S., 1526, so as to retain the liability of a surety on a stay bond upon appeal from a justice of the peace in the event the principal is discharged in bankruptcy pending the appeal, is prospective in effect and does not apply to bonds executed prior to its effect. As to whether a statute would be valid which attempted to change the liability of a surety on bonds executed prior to its passage, *quære? Sutton v. Greene*, 464.

C Repeal and Revival.

b Repeal by Implication and Construction

1. Statutes relating to the same subject-matter should be harmonized if possible by any fair and reasonable construction, and where a general and special statute are apparently incompatible the special statute may be considered as an exception to the general statute, and sustained upon this theory. *S. v. Baldwin*, 174; *Hammond v. Charlotte*, 469.

SUPERSEDEAS AND STAY BONDS.

B Liabilities on Bonds.

b Final Judgment

1. The liability of a surety on a bond given in accordance with C. S., 1526 to stay execution of a judgment of the justice of the peace pending appeal, C. S., 1525, attaches when or if final judgment is rendered against the principal, and where the principal has been relieved of liability by a discharge in bankruptcy pending the appeal, plaintiff's claim being filed in the schedule in bankruptcy, no final judgment is rendered against the principal, and the surety may not be held liable on the stay bond. *Sutton v. Davis*, 464.

2. Statute providing for liability of surety on stay bond upon discharge of principal in bankruptcy is prospective in effect. *Ibid.*

"SURPRISE AND EXCUSABLE NEGLECT" see Judgments K b.

TAXATION.

A Validity of Levy and Constitutional Requirements and Restrictions. (Proper expenditures of political subdivisions see Counties E b; Municipal Corporations K a; prohibition in Revenue Act of taxation by cities see Municipal Corporations I d 1.)

a Necessity of Vote to Issuance of Bonds

1. Water systems, sewer systems and street improvements are necessary expenses of a municipality, and bonds for such purposes may be issued by the governing body of a municipality without a vote of its residents, Art. VII, sec. 7, and bonds issued by a municipality for these purposes will not be declared invalid on the ground that the purposes for which the bonds were issued were not necessary for the particular municipality because of its small population, the determination of the necessity of the improvements for the particular municipality being exclusively in the discretionary power of its governing body. *Starmount Co. v. Hamilton Lakes*, 514.

2. Chapter 75, Private Laws of 1933, provides that in the event the operating revenues of the Port Commission of Morehead City should be insufficient to pay its operating and maintenance costs and to pay the interest on its bonds and provide a sinking fund for same, the town of Morehead City might levy a tax with the approval of its qualified voters to make up the deficiency: *Held*, a vote of the qualified electors of Morehead City is not necessary to the validity of the bonds proposed to be issued by the Port Commission, and if the contingency should happen and an election called and the tax approved by the qualified electors of the town, such tax would be valid regardless whether it was levied for a necessary expense. Art. VII, sec. 7. *Webb v. Port Com.*, 663.

c Uniform Rule, Ad Valorem and Classification

1. As a rule the State determines its own policy in matters of taxation, the courts intervening on an asserted violation of the due-process clause of the Federal Constitution only when the action of the State or its governmental subdivisions is arbitrary, and in this case the tax levy by defendant municipality is upheld, there being no evidence of any arbitrary action. *Hotel Co. v. Morris*, 484.

2. The legislative provision exempting the property and bonds of the Port Commission of Morehead City from taxation is valid since the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation if sold to and held by an agency of the United States Government, or are held by a purchaser from such Federal agency. *Webb v. Port Com.*, 663.

e Power to Lend Credit of State to Person, Firm, or Corporation

1. The Port Commission of Morehead City, created by chap. 75, Private Laws of 1933, is given authority to construct and maintain port facilities, to charge and collect tolls and fees in connection with the use of such facilities, its revenues derived from such tolls and fees being lawfully applicable solely to pay expenses of operating maintaining and constructing such port facilities, and in order to finance the project, to issue its bonds solely on its own credit, which bonds with interest are to be paid from its operating reve-

TAXATION A e—*Continued.*

nues and are not obligations of the State or the town of Morehead City, or any other municipality of this State. *Webb v. Port Com.*, 663.

f Form, Requisites and Amount of Bond Issue

1. Legislature may cure formal irregularities in bond issue by validating act. *Starmount Co. v. Hamilton Lakes*, 514.
2. The provisions in chap. 75, Private Laws of 1933, that the bonds to be issued by the Port Commission of Morehead City, should be sold under the provisions of the Municipal Finance Act with the approval of the Local Government Commission in the event that the bonds were not sold to a Federal agency, do not affect the validity of the bonds which may be issued and sold to the Federal agency, the provisions being applicable only in certain contingencies and being merely a part of the mechanics for the issuance of the bonds. *Webb v. Port Com.*, 663.

B Liability of Persons and Property.

d Property Exempt from Taxation

1. The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is held not exempt from taxation, N. C. Code, 7971(17), 7971(18), although patients unable to pay were relieved of payment and classed as charity patients, and although its stockholders, though not waiving their right to dividends, did not expect to receive dividends when they subscribed for stock, and no dividends were paid thereon for the years for which taxes were assessed, the hospital not being a charitable corporation, nor its property used entirely for charitable purposes, Art. V, sec. 5. *Hospital v. Rowan County*, 8.
2. Bonds and property of Port Commission of Morehead City are exempt from taxation. *Webb v. Port Com.*, 663.

D Lien and Priority.

d Subrogation to Tax Lien by Third Persons Paying Taxes

1. Sureties paying note given for taxes held not entitled to subrogation to tax lien under facts of this case. *Callahan v. Flack*, 105.

E Refunding and Remedies for Wrongful Collection.

d Right to Interest on Amount Refunded

1. Where the Commissioner of Revenue, with the approval of the Attorney-General, orders a refund of taxes paid under protest in accordance with C. S., 7979(a), merely upon demand and notice of the taxpayer, no suit having been brought to recover the taxes, the taxpayer is not entitled to interest on the amount refunded and a demurrer to the complaint in an independent action to recover interest thereon is properly sustained. The distinction between C. S., 7979(a), and C. S., 7880(194), which allows interest where the refund is recovered by judgment, is pointed out. *Cannon v. Maxwell, Comr.*, 420.

H Tax Sales and Foreclosures.

b Foreclosure of Tax Certificates

1. N. C. Code of 1931, sec. 8028, provides an exclusive remedy of an individual on a tax sale certificate, and the limitation therein pre-

TAXATION H b—*Continued.*

scribed for bringing action thereon applies, and an individual bringing action based on a tax sale certificate may not avail himself of the fact that no limitation is prescribed in C. S., 7990, by alleging that the tax certificate was assigned him by the county and that the action was brought under section 7990. *Logan v. Griffith*, 580.

2. Limitation on foreclosure of tax sale certificate cannot be taken advantage of by demurrer. *Ibid.*

c *Attack and Setting Aside*

1. Where the county has bid in land sold by it for nonpayment of taxes and assigned the certificate to another for value, and the assignee has brought action to foreclose his certificate in which summons has been served on the owners of the land in whose name the lands had been listed, a judgment by default final for the want of an answer will estop the original owners of the land or those claiming under them from claiming title as against the purchaser at the sale of the lands by the commissioner appointed by the court in the foreclosure proceedings. N. C. Code, 1931, sec. 8037. *Street v. Hildebrand*, 208.

2. Where those claiming a mortgage lien on lands have their mortgage on record before the beginning of proceedings to enforce the tax lien on the lands and have been served by publication in the action to foreclose the tax certificate, in accordance with the provisions of our statute, and within six months from the service by publication they appear and file answers, their mortgage liens are not affected by the sale of the lands by a commissioner appointed by the court in the action to foreclose the tax certificate, and upon establishing their interest in the land, they are entitled to have the judgment and sale of the land declared void, and the deed to the purchaser at the sale set aside upon reimbursing the purchaser for the amount of taxes paid plus interest, penalties and costs. N. C. Code, 1931, sec. 8037. *Ibid.*

3. *Held*, motion to set aside tax foreclosure sale for irregularities was correctly allowed under facts of this case. *Buncombe County v. Arbogast*, 745; *Asheville v. Arbogast*, 749.

TRESPASS. (In repossessing property see Sales I d.)

B Actions.

c *Evidence and Burden of Proof*

1. In an action to recover damages for trespass plaintiff has the burden of proof on the issue, but defendant has the burden of proof on the issue of prescription and adverse user set up by him as a defense. *McPherson v. Williams*, 177.

TRIAL. (Right to trial by jury see Jury; trial of criminal actions see Criminal Law I; trial of particular actions see Particular Titles of Actions.)

B Reception of Evidence.

c *Withdrawal of Evidence*

1. The trial judge has the power to grant a motion to strike out incompetent evidence which had been admitted without objection, and the time he should hear the motion is within his discretion. *Stein v. Levins*, 302.

TRIAL—*Continued.*

D Taking Case or Question from Jury. (In particular actions see Particular Titles of Actions.)

a Nonsuit

1. Upon a motion of nonsuit all the evidence, whether offered by plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Hobbs v. Kirby*, 238; *Keller v. R. R.*, 269; *Smith v. Assurance Society*, 387; *Moore v. Powell*, 636; *Dickerson v. Reynolds*, 770.

2. Where in an action on a note defendants set up the defense that the plaintiff's testator, the payee of the note, canceled and surrendered the note during his lifetime, the burden of the issue is on defendants, and where this is the determinative issue they are not entitled to a granting of their motion as of nonsuit. *Trust Co. v. Ebert*, 651.

E Instructions.

c Form, Requisites and Sufficiency of Instructions

1. The question whether a witness whose deposition has been taken by the plaintiff and offered by the defendant was a witness for the plaintiff is a subordinate feature of the trial concerning which no instruction is essential in the absence of a written request to that effect. *Stein v. Levins*, 302.

e Requests for Instructions

1. An exception to the refusal of the trial court to give requested instructions will not be sustained where it appears that the instructions requested were substantially given in language equally explicit and clear. *Newman v. Coach Co.*, 26; *In re Will of Wilder*, 431.

2. Failure to instruct as to subordinate feature of trial will not be held for error in absence of special request for such instruction. *Stein v. Levins*, 302.

F Issues.

a Form and Sufficiency in General. (In action on notes see Bills and Notes H d.)

1. The form and number of issues in a civil action is within the sound discretion of the trial court subject to the restrictions that the issues must be issues of fact and raised by the pleadings, that a verdict upon them will enable the court to render judgment, and that the parties have opportunity to present any view of the law arising out of the evidence. *Colt Co. v. Barber*, 170.

2. Where the issues submitted by the trial court to the jury arise upon the pleadings and are sufficient in form to enable the parties to present to the jury all phases of the controversy, and the answers to the issues are sufficient, when taken with the admissions of the parties, to enable the court to proceed to judgment, an exception to the issues will not be sustained on appeal. *Furr v. Trull*, 417.

3. Issues submitted to the jury are sufficient if they arise upon the pleadings and present to the jury all essential or determinative facts in controversy, the issues being largely in the discretion of

TRIAL F a—*Continued.*

the court, and where they are not prejudicial and do not affect a substantial right an exception thereto will not ordinarily be sustained. *Grier v. Weldon,* 575.

G Verdict. (Setting aside verdict in court's discretion see New Trial B h.)

b Form and Sufficiency of Answers to Issues in General

1. Where the verdict of the jury establishes contributory negligence on the part of plaintiff, he may not recover damages assessed by the jury in his favor although the verdict also establishes negligence on the part of defendant. *Bullard v. Ross,* 495.

TRUSTS. (Right of *cestuis que trust* to preference in insolvent bank's assets see Banks and Banking H e 1.)

A Creation and Validity. (Created by will see Wills E h.)

b Resulting and Constructive Trusts

1. Jurisdiction to enforce a trust arises where property is accepted on terms of using or holding it for the benefit of another, and it is not necessary that the terms of the trust be made in writing at the time legal title is conveyed. *Reynolds v. Morton,* 491.

USURY.

A Usurious Contracts and Transactions.

a Construction of Contracts and Transactions as to Usury

1. In determining whether a contract is usurious the courts will look to the substance of the transaction and not its form, and in this case the fact that the sum borrowed was made payable to the borrowers and an attorney with allegations and evidence that the attorney under instructions from the lender deducted a certain sum therefrom before the borrowers could obtain the money, together with the "item of expense" set out in the deed of trust securing the loan, *is held* sufficient to have been submitted to the jury on the question of usury. *Jonas v. Mortgage Co.,* 89.

2. In construing a contract in reference to usury the courts will look to its substance and not to its form, and a contract will be declared usurious when it appears that it was the purpose and intent of the lender to charge and receive a greater rate of interest than that allowed by law. C. S., 2305. *Polikoff v. Service Co.,* 631.

B Effect of Usury and Liabilities.

a In General

1. Where in sustaining an exception to the referee's finding that the contract in question was governed by the laws of another state, the court finds that the stipulation in the contract that the laws of such other state should apply was made in bad faith for the purpose of evading the usury laws of this State, and that defendant charged and received payment of usurious interest, the findings are sufficient to support a judgment in plaintiff's favor that he recover of defendant twice the amount of usurious interest paid as determined by the laws of this State. C. S., 2306. *Polikoff v. Service Co.,* 631.

b Where Claim of Usury is Coupled with Demand for Equitable Relief

1. Where plaintiff seeks to restrain the exercise of the power of sale contained in a deed of trust on the ground of usury he is required

USURY B b—*Continued.*

to pay the amount borrowed plus six per cent interest, and in such action he may not recover the statutory penalty for usury, the action being equitable in its nature, and where in an action to restrain the sale of the lands the deed of trust is canceled under order of court upon plaintiff's payment of a designated sum and the filing of a bond to secure the payment of any amount adjudged to be due over and above the amount paid, and plaintiff seeks to recover from the lender for usury and it appears from a careful calculation that the sum paid does not exceed the amount actually received by plaintiff plus six per cent interest, a directed verdict that plaintiff recover nothing of the borrower will be upheld on appeal. *Jonas v. Mortgage Co.*, 89.

2. Where in a legal action the defendant, a borrower of money, seeks an equitable relief and alleges usury, it is required that he pay the principal sum due with the legal rate of interest, the only forfeiture which he can enforce being the interest in excess of the legal interest rate. C. S., 2306. *Mortgage Corp. v. Wilson*, 493.

c *Parties Chargeable*

1. The charge of usury on a negotiable note does not render the note void as to the principal thereof but only the promise to pay usurious interest is void, and interest thereon is forfeited in an action on the note brought by the payee or a holder in due course, but where the payee withholds from the borrower a part of the face amount of the note, the same being a device to evade the usury laws, the borrower is entitled in equity to have the note credited with the amount so withheld upon the maturity of the note as against the payee, but as against a holder in due course he may not enforce such equity, C. S., 3038, and the holder in due course is entitled to recover the principal of the note with interest thereon from the date of judgment. *Bank v. Jones*, 648.

VENDOR AND PURCHASER.

B Construction and Operation of Contract. (Parol agreement to convey see Frauds, Statute of, B b; specific performance of contract to convey see Specific Performance B b.)

c *Improvements and Appurtenances*

1. The owner of lands laid them out into streets with water and sewer systems and other improvements, advertising that the development was a bold experiment in scientific town planning and contemplated the creation of a "model village," and sold one of the lots to the plaintiff after having proceeded with the proposed physical development, the plaintiff then being satisfied, but becoming subsequently dissatisfied when the improvements were not maintained: *Held*, plaintiff cannot maintain an action for breach of contract in the sale of her lot for failure to maintain the improvements, there being no evidence that the contract of the parties covered the continued maintenance of the improvements, or that the grantor's agents were authorized to make agreement to that effect. *Dodds v. Trust Co.*, 153.

VENUE.

A Nature and Subject of Action.

a Interest in Realty

1. Upon a motion for change of venue as a matter of right the nature and purpose of the action is to be determined by the allegations of the complaint and not the prayer for relief. *Mortgage Co. v. Long*, 533.

2. Where the allegations of the complaint, if established, would entitle plaintiff to judgment for a sum of money and to a decree foreclosing the mortgage on lands securing such sum, the action involves title to real estate, and when the action is brought in the county of the corporate plaintiff's residence, C. S., 469, it is removable as a matter of right to the county in which the land is situate upon defendant's motion aptly made, 463(3), and plaintiff may not defeat the right of removal by failing to pray specifically for a decree of foreclosure where the prayer for relief is for the sum of money and for such other and further relief as plaintiff may be entitled to in law or equity. *Ibid.*

d Residences of Parties

1. Wife may sue for alimony without divorce in county of her residence. *Miller v. Miller*, 753.

D Objections to Venue.

a Apt Time for Motion for Change of Venue

1. A motion for change of venue as a matter of right made before time for filing answer has expired is made in apt time. C. S., 470. *Mortgage Co. v. Long*, 533.

"WAIVER" see Estoppel C.

"WAR RISK INSURANCE" see Insurance N a.

WILLS.

B Contracts to Devise.

a Requisites and Validity

1. Parol contract to devise real estate comes within statute of frauds. *Grantham v. Grantham*, 363.

2. Where a party renders personal services to another in reliance on a parol contract to devise, which the promisor fails to perform, the promisee may maintain an action against the administrators of the promisor to recover the value of such services, and where plaintiff sufficiently alleges facts entitling him to such recovery in an action against the administrators, his right to recovery will not be defeated by an untenable prayer for specific performance. *Ibid.*

c Measure of Damages

1. The rule for the assessment of damages in a suit on an unenforceable parol contract to devise real property, where plaintiff has performed personal services to defendant's intestate in reliance on the promise to devise such real estate, is the value of the services rendered, the recovery being based on the theory of implied *assumpsit* or *quantum meruit*, and plaintiff is not entitled to recover the value of the land at the time the contract to devise was made.

WILLS B c—*Continued.*

The admissibility of evidence of the value of the land at such time as tending to establish the value placed on the services by the parties and as being competent evidence of their value, discussed by *Mr. Justice Adams. Grantham v. Grantham*, 363.

D Probate and Caveat.

h Evidence

1. Declaration tendered by caveators to show pedigree held incompetent, declarant being interested in event, and the evidence being irrelevant to sole issue of mental capacity. *In re Will of Hargrove*, 72.

2. The probate of a will in common form without citation to those in interest "to see the proceedings" C. S., 4139, is an *ex parte* proceeding and not binding on caveators upon the issue of *devisavit vel non* raised in their direct attack upon the validity of the will, and the admission in evidence in the caveat proceedings of the order of probate constitutes reversible error. *Wells v. Odum*, 110.

E Construction and Operation.

a General Rules of Construction

1. In the construction of wills there is a presumption against intestacy, the intention of the testator as expressed in the will, construing the will as an entirety, will be given effect. *In re Hill*, 160.

d Vested and Contingent Interests

1. Where the testator devises certain property to his daughters in fee and creates a trust estate in the remainder of his property for twenty years and directs that the rents and profits therefrom collected by his executor and trustee and the net income therefrom be paid to his four sons, and "if either of them shall die before the expiration of twenty years leaving child or children, then such child or children shall receive their father's share of said net income," with provision for the division of the estate among the testator's heirs living at the expiration of the trust estate: *Held*, upon the death of one of the sons, his daughter him surviving is entitled to her father's share in the net income and a contingent interest in the *corpus* of the estate, but has no vested interest therein. *Woody v. Christian*, 610.

f Designation of Devisees and Legatees and their Respective Shares

1. The will in this case directed that the executor sell the testator's "Chattel property" and give the proceeds of the sale to testator's wife. There was no residuary clause in the will. *Held*, the word "chattel" embraced only movable personal property, and as to certain funds coming into the hands of the executor the testator died intestate, and such funds should be distributed among his heirs at law according to the canons of descent. *In re Hill*, 160.

h Estates in Trust

1. Under the terms of the will in this case the remainder of testator's property was left in trust and the executor and trustee was directed to collect the rents and profits from the estate and pay the same, after deducting taxes, cost of repairs, etc., to certain beneficiaries each month. Upon the later shrinkage in value of the estate and a great decrease in the net income therefrom, certain of the benefi-

WILLS E h—*Continued.*

ciaries instituted action to have the trustee authorized to use part of the *corpus* of the estate to supplement the monthly payments to the beneficiaries on the ground that they were the primary objects of the testator's bounty and that the reduced income was insufficient for their support and that they had no other means of supporting themselves. *Held,* the rule that the courts will construe a will with special regard for the primary objects of the testator's bounty is limited by the unequivocal terms of the will, and the court may not authorize the trustee to use part of the *corpus* of the estate to temporarily supplement the monthly income of the beneficiaries. *Woody v. Christian,* 610.

2. Where the executor and trustee under a will is directed to collect the rents and profits from the estate and from the proceeds to first pay taxes, cost of repairs, and all necessary expenses, etc., and then pay the remainder of the income monthly to certain beneficiaries, upon the shrinkage of the estate and the income therefrom the court may order and direct the trustee to use part of the *corpus* of the estate to make extensive repairs necessary to the preservation of the real estate and provide rental income therefrom, and the cost of such extensive repairs need not be paid for out of the net income to the detriment of the beneficiaries. *Ibid.*

F Rights and Liabilities of Devisees and Legatees.

d Election

1. Where devisee makes election the land passes under the will unaffected by devisee's deed evidencing such election. *Burrowes v. Franks,* 456.

i Liabilities to Creditors of Estate

1. In an action against a devisee under the will of a former clerk of the Superior Court and others to recover for the clerk's shortage in accounting for the funds of an estate, judgment may be rendered against the devisee only to the extent of the property passing under the clerk's will, and personal judgment against the devisee is error. C. S., 60. *Moffitt v. Davis,* 565.

WITNESSES—Corroboration of, see Evidence D f; competency of, to testify as to transactions with deceased see Evidence D b.

WRONGFUL DEATH see Death B.